Angelena Moy OUSD(A&T)/DDP-MPI (703) 604-5386/87

Ms Davis:
Per our phone con, please
accept the attached material
for the FOIA Reading Boom.
(1) The Rights in Technical Data
proposed rule - Changes to
DFARS Parts 211, 227 and 252.
(2) Public comments on the
proposed rule from #39 Public
Commentors.
Please call me if
you nood more information.
Thank you, us
A. Moy X

PEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 93-24]

Amendment to Rules of Practice and Procedure

AGENCY: Federal Maritime Commission.
ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Maritime
Commission, after reviewing the
comments received and evaluating the
concerns that led to the Proposed Rule,
is withdrawing the Rule and is
discontinuing the proceeding. The
Commission concludes that the rule is
not needed at this time. The
Commission will continue to address
specific service of process situations on
an ad hoc basis.

DATES: This action is effective June 20,

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001, (202) 523-5725.

20573-0001, (202) 523-5725.

SUPPLEMENTARY INFORMATION: By Notice of Proposed Rulemaking ("NPR" or "Proposed Rule") published in the Federal Register, 58 FR 68841-68843 (Dec. 29, 1993), the Commission proposed to amend Rule 113, 46 CFR 502.113 of the Commission's Rules of Practice and Procedure to make the complainant in a private action responsible for service of its complaint when the Commission has been unsuccessful, for any reason, in effectuating service by certified or registered mail.

The only comment in response to the NPR was filed by the Maritime Administrative Bar Association ("MABA"), which opposes the Proposed Rule.

Background

Under Rule 113, the Commission is presently charged with the responsibility for service of private complaints, amendments to complaints, and complainant's memoranda filed in shortened procedure cases, while Rule 114, 46 CFR 502.114, requires that parties serve all other pleadings. In administering Rule 113, the Commission has experienced occasions where complaints and other pleadings were returned by the United States

Postal Service because the respondent refused delivery, an incorrect address was provided by the complainant, or the respondent had moved leaving no forwarding address. In such circumstances, the Commission has resorted to alternative methods of service such as utilizing a Commission investigator to personally find and serve the respondent, or serving the secretary of state pursuant to state law. The NPR noted that the Proposed Rule would conform the Commission's Rules regarding service more closely to the Federal Rules of Civil Procedure.

Comments

In opposing the Proposed Rule, MABA argues that the Shipping Act, 1916, 46 U.S.C. app. 821, and the Shipping Act of 1984, 46 U.S.C. app. 1710(b) ("Shipping Acts"), prohibit the Commission from shifting the burden of "personally serving private complaints from the Commission to private parties." Comments at 1-2. MABA's position is that only the Commission can serve the complaint, and that a "rule is which service of the complaint is performed by someone other than the Commission does not comply with the clear statutory command that the Commission 'shall furnish' a copy of the complaint." Id. at 2. Regarding the Commission's interest in bringing Rule 113 in conformity with the Federal Rules of Civil Procedure, MABA contends that the Federal Rules "are not underlain by a similar statutory obligation that the district court 'furnish a copy of the complaint' to a defendant." Id. at 3. Finally, MABA cites differences between district court and FMC proceedings, and ** * * practical reasons why the Commission should not abandon its statutory responsibility to serve a complaint." Id. at 3.

MABA argues that the Shipping Acts' statutory provisions governing complaints mean what they say and that the Commission is compelled to serve a respondent on behalf of a private complainant. It contends that because the Commission has national jurisdiction, field offices, and an extensive regulated persons index, it is also in a better position to personally serve the respondent. MABA believes that the Proposed Rule would place the burden of personal service on small companies, thereby acting as a possible barrier to the prosecution of claims before the agency, and exacerbating whatever service problems now exist.

Conclusion

Upon a reevaluation of the concerns that prompted this proposal, the Commission has decided not to proceed to a final rule. Any actual service of process difficulties in a specific case will be addressed on an ad hoc basis

Therefore, it is ordered, That the Proposed Rule is withdrawn and this proceeding is discontinued.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 94-14914 Filed 6-17-94; 8:45 am]

DEPARTMENT OF DEFENSE

48 CFR Parts 211, 227, and 252

Defense Federal Acquisition
Regulation Supplement; Rights in
Technical Data

AGENCY: Department of Defense (DoD).
ACTION: Proposed Rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to prescribe the technical data regulations required by 10 U.S.C. 2320, Rights in Technical Data. The proposed regulations are intended to establish a balance between the interests of data developers and data users, encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 19, 1994 to be considered during formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Deputy Director Major Policy Initiatives, 1200 S. Fern St., Arlington, VA 22202-2808, ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP. Please cite DAR Case 91-312 on all correspondence related to this proposed rule.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena Moy, (703) 604-5385/5386

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule publishes for public comment regulations that adopt the recommendations of the Government-Industry Technical Data Advisory Committee established pursuant to the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Pub. L. 102–190).

The Act required the Secretary of Defense to form a Government-Industry advisory committee to develop recommended regulations to supersede the interim regulations which presently

¹ Section 502.114 provides that all pleedings, documents, and papers (except requests for subpoenas) in proceedings before the Commission shall, when tendered to the Commission or the presiding officer for filing, show that service has been made upon all parties to the proceeding, and upon any other persons required to be served.

implement requirements of 10 U.S.C. 2320, Rights in Technical Date Committee meetings began in July 1992 and ended in December 1993. The committee concluded that the existing regulations are a disincentive to companies that create new technology with their own funding to provide that technology to the Defense Department. The committee believes this proposed regulation establishes a balance between data developers' and data users' interests and will encourage creativity. encourage firms to offer DoD new technology, and facilitate dual use development. The protection of privately developed data is crucial, particularly for developers that have limited product lines.

This proposed rule revises and retitles Defense FAR Supplement Subpart 227.4. Rights in Technical Data; adds a new Subpart 227.5, Rights in Computer Software and Computer Software Documentation; amends Subpart 211.70, Acquisition and Distribution of Commercial Products; and, amends Part 252. Solicitation Provisions and Contract Clauses. Significant differences from the exiting regulations are summarized below.

a. License Rights

This proposed rule identifies any government rights in technical data or, computer software as specific, nonexclusive, license rights the contractor has granted the Government. The standard license rights are defined in the proposed clauses at 252.227–7013, "Rights in Technical Data—Noncommercial Items" and 252.227–7014, "Rights in Noncommercial Computer Software and Computer Software Documentation." The rule provides that the contractor retains all rights not granted to the Government.

b. Non-Standard License Rights

This proposed rule permits the negotiation of nonstandard license rights whenever the parties agree that the standard rights are not appropriate for a particular procurement.

c. Elimination of "Required for Performance" Criterion

Existing DFARS regulations permit DoD to obtain unlimited rights in technical data if development was "required for the performance of a government contract or subcontract." This proposed rule eliminates that criterion.

d. Clarification of Indirect Cost

10 U.S.C. 2320 requires implementing regulations to define the treatment of

indirect costs. The existing regulations require indirect costs of development to be considered government funcied if development was required for the performance of a government contract. This proposed rule provides for all development accomplished with costs charged to indirect cost pools to be considered development accomplished at private expense.

e. Standard Government Purpose Rights

The existing rule gives the government unlimited rights in technical data that pertain to items, components, or processes developed with a mix of private and government funds unless the developer requests the exclusive right to commercialize and a license can be negotiated. It does not permit negotiations when the government anticipates the data will be needed for reprocurement. This proposed rule replaces those criteria with a standard license, applicable in all mixed funding situations, which is intended to recognize mixed funded development. The license allows the government to use the data for governmental purposes, including competition, but does not allow commercial use. Government purpose rights will be effective for five years following award of the development contract or subcontract or such other period as the parties negotiate. The Government has unlimited rights in the data upon expiration of the government purpose rights period.

f. Segregation of Development Costs

This proposed rule allows private expense determinations to be made at the lowest practicable level when determining rights in technical data or computer software.

g. Commercial Items (Other Than Commercial Computer Software and Commercial Computer Software Documentation)

The clause at 252.211-7015,
"Technical Data and Computer
Software—Commercial Items is
removed. This proposed regulation adds
a clause at 252.227-7015, "Technical
Data—Commercial Items" that generally
requires DoD to acquire only the
technical data pertaining to commercial
items or processes that are customarily
provided to the public.

h. Separate Treatment for Computer Software

A new Subpart 227.5, "Rights in Computer Software and Computer Software Documentation" and a new clause, 252.227-7014, "Rights in Noncommercial Computer Software and

Computer Software Documentation" are proposed to separate Computer software from technical data. This separation increases the volume of the regulations but provides greater flexibility to deal with new statutory requirements or technological advancements that affect either technical data or computer software only or affect both to varying degrees. The term computer software documentation is defined in these regulations to mean owner's manuals. user's manuals, installation instructions. and similar items that explain the capabilities of the software or provide instructions for use. Therefore, although computer software documentation is a form of technical data (10 U.S.C. 2302(4), most applicable requirements are contained in the software Subpart

i. Software Related Definitions

(1) The definitions of "computer program", "computer software", and "computer software documentation" are revised. Definitions of "developed" are added for computer programs, software, and documentation.

(2) The definition of "restricted rights" is revised. The existing rule's right to use software with the computer for which it was acquired is replaced by the right to use a program with one computer at one time. The Government's rights to transfer programs, modify restricted rights software, and permit others to use or modify software for the Government in specific situations, are clarified.

j. Commercial Computer Software and Commercial Computer Software Documentation

This proposed rule provides that the Government shall have only the rights specified in the license under which the commercial computer software or documentation is obtained. A contract clause is not prescribed.

k. Use and Nondisclosure Agreements

The standard nondisclosure agreement contained in the existing rule is amended. The proposed agreement covers third party use and disclosure of all data or software in which the Government's rights are restricted. The proposed regulations permit the use of class nondisclosure agreements.

1. Contracts Under the Small Business Innovative Research Program

Alternate 1 to the clause at 252.227–7013 of the existing rule is replaced by a new clause, 252.227–7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs." A

single clause, rather than separate technical data and computer software clauses each with alternate provisions, reduces contractual burdens on these small businesses. Data generated under these contracts is required to be protected for five years instead of the four year statutory requirement.

B. Regulatory Flexibility Act

This proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. This proposed rule modifies the circumstances under which the Government may release or disclose technical data or computer software to interested persons or permit those persons to use the technical data or computer software. An initial Regulatory Flexibility Analysis (IRFA), that updates the IRFA submitted for DAR Case 87-303 on March 29, 1988, has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. Comments are invited. Comments from small entities will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite DAR Case 91-312 in correspondence.

C. Paperwork Reduction Act

This proposed rule implements information collection requirements under 10 U.S.C. 2321 and requires the submission of other information to comply with requirements in 10 U.S.C. 2320 that are within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. A request for clearance, superseding the analysis performed for DAR Case 87–303, will be submitted to OMB.

List of Subjects in 48 CFR Parts 211, 227, and 252

Government procurement.

Claudia L. Naugle,

Deputy Director. Defense Acquisition Regulations Council.

Therefore, it is proposed to amend 48 CFR parts 211, 227, and 252 as follows:

1. The authority citation for 48 CFR parts 211, 227, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Part

PART 211—ACQUISITION AND DISTRIBUTION OF COMMERCIAL PRODUCTS

211.70 [Amended]

Subpart 211.70 is amended by revising the words "product" to read "item" and "products" to read "items" wherever they appear, except in section 211.7004–1(m) where the phrase "standard commercial items" remains unchanged.

3. Section 211.7001 is amended by removing paragraphs (c) and (d), by redesignating paragraphs (e) and (f) as (c) and (d), respectively, and by revising paragraph (a) to read as follows:

211.7001 Definitions.

(a) The terms commercial products, existing or prior source and minor modification are defined in the provision at 252.211–7012, Certifications—Commercial Products—Competitive Acquisitions.

§ 211.7004-1 [Amended]

4. Section 211.7004-1(h) is removed and reserved.

5. Section 211.7005 is amended by removing paragraph (a)(29) and by redesignating paragraphs (a)(30) through (a)(33) as paragraphs (a)(29) through (32) respectively.

6. Section 211.7005 is amended by removing paragraphs (b)(34) and (35); by redesignating paragraphs (b)(36) through (51) as paragraphs (b)(34) through (49), respectively; by redesignating paragraphs (b)(52) through (54) as paragraphs (b)(51) through (53), respectively; and by adding a new paragraph (b)(50) to read as follows:

§ 211.7005 contract clauses.

(b) * * *

(50) 252.227-7015 Technical Data— Commercial Items

Subpart 227.4—Rights in Technical Data

7. Subpart 227.4 is revised to read as follows:

Sec.

227.4 Rights in technical data.

227.400 Scope of subpart.

227.401 Definitions.

227.402 Commercial Items or processes.

227.402-1 Policy

227.402-2 Rights in technical data.

227.402-3 Contract clause.

227.403 Noncommercial items or processes.

227.403-1 Policy.

227.403-2 Acquisition of technical data.

227.403-3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction, or disclosure.

227.403-4 License rights.

227.403-5 Government rights.

227.403-6 Contract clauses.

227.403-7 Use and non-disclosure

227.403-8 Deferred delivery and deferred ordering of technical data.

227.403-9 Copyright.

227.403-10 Contractor identification and marking of technical data to be furnished with restrictive markings.

227.403-11 Contractor procedures and records.

227.403-12 Government right to establish conformity of markings.

227.403-13 Government right to review, werify, challenge, and validate asserted restrictions.

227.403-14 Conformity, acceptance, and warranty of technical data

227.403-15 Subcontractor rights in technical data.

227.403-16 Providing technical data to foreign governments, foreign contractors, or international organizations.

227.403-17 Overseas contracts with foreign

227.404 Contracts under the Small Business Innovative Research Program.

227.405 Contracts for the acquisition of existing works.

227.405-1 General.

227.405-2 Acquisition of existing works without modification.

227.405-3 Acquisition of modified existing works?

227.406 Contracts for special works.

227.407 Contracts for architect-engineer services.

227 407-1 Architectural designs and data clauses for architect-engineer or construction contracts.

227.407-2 Contracts for construction supplies and research and development work.

227.407-3 Approval of restricted designs. 227.408 Contractor data repositories.

227.4 Rights in technical data.

227.400 Scope of subpart.

This subpart-

(a) Prescribes policies and procedures for the acquisition of technical data and the rights to use, modify, reproduce, release, perform, display, or disclose technical data. It implements requirements in the following laws and Executive Order:

10 U.S.C. 2302(4)

10 U.S.C. 2305 (subsection (d)(4))

10 U.S.C. 2320

10 U.S.C. 2321

10 U.S.C. 2325

Executive Order 12591 (Subsection 1(b)(6)).

(b) Does not apply to computer software or technical data that is computer software documentation (see 227.5).

227,401 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the terms offeror and contractor include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) The terms Commercial items and minor modification, as that term is used

with commercial items, are defined in the clause at 252.227–7015, "Rights in Technical Data—Commercial Items."

(c) Other terms used in this subpart are defined in the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items."

227.402 Commercial items or processes.

227.402-1 Policy.

(a) DoD shall acquire only the technical data customarily provided to the public with a commercial item or process, except technical data—

(1) Required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand alone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military requirements; or,

(2) That describe the modifications made to a commercial item or process in order to meet the requirements of a

Government solicitation.

(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required to—

(1) Except for the technical data described in 227.402-1(a), furnish technical information related to commercial items or processes that is not customarily provided to the public;

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, or disclose technical data pertaining to commercial items or processes except for a transfer of rights mutually agreed upon.

227,402-2 Rights in technical data.

(a) The clause at 252.227-7015, "Rights in Technical Data—Commercial Items" provides the Government specific license rights in technical data pertaining to commercial items or processes. Generally, DoD may use, modify, duplicate, release, or disclose such data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul, may not be released or disclosed to, or used by, third parties without the contractor's express permission.

(b) If additional rights are needed, contracting activities must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific additional rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

227,402-3 Contract clause.

Use the clause at 252.227-7015, "Rights in Technical Data—Commercial Items", in all solicitations and contracts when the contractor will be required to deliver technical data pertaining to commercial items or processes.

227.403 Noncommercial Items or processes.

227.403-1 Policy.

- (a) DoD policy is to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs.
 - (b) Solicitations and contracts shall—
- (1) Specify the technical data to be delivered under a contract and delivery schedules for the data;
- (2) Establish or reference procedures for determining the acceptability of technical data;
- (3) Establish separate contract line items, to the extent practicable, for the technical data to be delivered under a contract and require offerors and contractors to price separately each deliverable data item;
- (4) Require offerors to identify, to the extent practicable, technical data to be furnished with restrictions on the Government's rights and require contractor's to identify technical data to be delivered with such restrictions prior to delivery.
- (c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense except for the data identified at 227.403-5(a) (2) and (a)(4) through (9).
- (d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, components, or processes developed at private expense solely because the Government's rights to use, release, or disclose technical data pertaining to those items may be restricted.
- (e) As provided in 10 U.S.C. 2305, solicitations for major systems development contracts shall not require offerors to submit proposals that would permit the Government to acquire competitively items identical to items developed at private expense unless a determination is made at a level above the contracting officer that:
- (1) The offeror will not be able to satisfy program schedule or delivery requirements; or,
- (2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs.

227,403-2 Acquisition of technical data.

- (a) Procedures for acquiring technical data are contained in DoD 5010.12, DoD Data Management Program. Contracting officers shall work closely with data managers and requirements personnel to assure that data requirements included in solicitations are consistent with the policy expressed in 227.403-1.
- (b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs for technical data. Data needs must be established giving consideration to the contractor's economic interests in data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the data; reprocurement needs; repair. maintenance and overhaul philosophies; spare and repair part considerations; and, whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when replacement items or spare parts can be acquired using performance specifications, form, fit and function data, or when there are a sufficient number of alternate sources which can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.
- (2) When reviewing offers received in response to a solicitation or other request for data, data managers must balance the original assessment of the Government's data needs with data prices contained in the offer.
- (c) Contracting officers are responsible for assuring that, to the maximum extent practicable, solicitations and contracts—
- (1) Identify the type and quantity of the technical data to be delivered under the contract and the format and media in which the data will be delivered;
- (2) As required by 10 U.S.C. 2320, establish each deliverable data item as a separate contract line item (this requirement may be satisfied by listing each deliverable data item on an Exhibit to the contract);
- (3) Identify the prices established for each separately priced deliverable data item under a fixed price type contract:
- (4) Include delivery schedules and acceptance criteria for each deliverable data item; and,
- (5) Specifically identify the place of delivery for each deliverable item of technical data.

227.403-3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) 10 U.S.C. 7329 requires, to the maximum extent practicable, an identification prior to delivery of any technical data to be delivered to the Government with restrictions on use.

(b) Use the provision at 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions" in all solicitations that include the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items." The provision requires efferors to identify any technical data for which restrictions, other than copyright, on use, release, or disclosure are asserted and to attach the identification and assertions to the offer.

(c) Subsequent to contract award, to clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items", permits a contractor, under certain conditions, to make additional assertions of use, release, or disclosure restrictions. The prescription for the use of that clause and its alternate is at 227.403-6(a).

227.403-4 License rights.

(a) Grant of license. The Government. obtains rights in technical data. including a copyright license, under an irrevocable license granted or obtained for the Government by the contractor. The contractor or licensor retains all rights in the data not granted to the Government. For technical data that pertain to items, components, or processes, the scope of the license is generally determined by the source of funds used to develop the item. component, or process. When the technical data do not pertain to items, components, or processes, the scope of the license is determined by the source of funds used to create the data.

(1) Technical data pertaining to items, components, or processes. Contractors or licensors may, with some exceptions (see 227.403-5(a)(2) and (a) (4) through (9)), restrict the Government's rights to use, release, or disclose technical data pertaining to items, components, or processes developed exclusively at private expense (limited rights). They may not restrict the Government's rights in items, components, or processes developed exclusively at Government expense (unlimited rights) without the Government's approval. When an item, component, or process is developed with mixed funding, the Government may use, release, or disclose the data pertaining to such items, components, or processes within the Government without restriction but may release or

disclose the data conside the Government only for Government purposes [government purpose rights].

(2) Technical data that do not pertain to items, components, or processes. Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items, components or processes. The Government generally obtains unlimited zights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data was created exclusively at private expense.

(b) Source of funds determination. The determination of the source of development funds for technical data pertaining to items, components, or processes should be made at any practical sub-item or sub-component level or for any segregable portion of a process. Contractors may assert limited rights in a segregable sub-item, sub-component, or portion of a process which otherwise qualifies for limited rights under the clause at 252.227-7013, "Rights in Technical Data."

227,403-5 Government rights.

The standard license rights that a licensor grants to the Government are unlimited rights, government purpose rights, or limited rights. Those rights are defined in the clause at 252.227-7013. In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in data in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) Unlimited rights. The Government obtains unlimited rights in technical data that are—

(1) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(2) Studies, analyses, test data, or similar data produced in the performance of a contract when the study, analysis, test, or similar work was specified as an element of performance;

(3) Created exclusively with government funds in the performance of a contract that does not require the

development, manufacture, construction, or production of items, components, or processes.

(4) Form, fit, and function data; (5) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(6) Corrections or changes to technical data furnished to the contractor by the

Government;

(7) Publicly available or have been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(8) Data in which the Government has obtained unlimited rights under another Government contract or as a result of

negotiations; or,

(9) Data furnished to the Government, under a Government contract or subcontract thereunder, with—

(i) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such data for commercial purposes has expired.

(b) Government purpose rights. (1) The Government obtains government purpose rights in technical data—

(i) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights as provided in 227.403-5 (a)(2) and (a)(4) through (9); or,

(ii) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) The period during which government purpose rights are effective is negotiable. The clause at 252.227-7013 provides a nominal five year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the technical data without consideration from either party. Longer periods should be negotiated when a five year period does not provide sufficient time to apply the data for commercial purposes or when necessary to recognize subcontractors' interests in the data.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise

that required the development. Upon expiration of the Government rights period, the Government has unlimited rights in the data including the right to authorize others to use the data for

commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, technical data marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose data in which it has government purpose rights to any person, or authorize others to do so,

(i) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at

227.403-7; or

(ii) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at 252.227-7025. "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends."

(5) When technical data marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227-7025, the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a

use and non-disclosure agreement. (6) Contracting activities shall establish procedures to assure that technical data marked with government purpose rights legends are released or disclosed, including a release or disclosure through a government solicitation, only to persons subject to the use and non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and nondisclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights data. Documents transmitting government purpose rights data to persons under class agreements shall identify the technical data subject to government purpose rights and the class agreement under which such data are provided.

(c) Limited rights. (1) The Government obtains limited rights in technical

(i) That pertain to items, components, or processes developed exclusively at private expense except when the

Government is entitled to unlimited rights as provided in 227.403-5 (a)(2) and (a)(4) through (9); or,

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) Data in which the Government has limited rights may not be used, released, or disclosed outside the Government without the permission of the contractor asserting the restriction except for a use, release or disclosure that is-

(i) Necessary for emergency repair and

overhaul; or,

(ii) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or

informational purposes:

(3) The person asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data except notification of an intended release, disclosure, or use for emergency repair or overhaul which shall be made as soon as practicable.

(4) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under 227.403-5(c)(2) (i) or (ii). the intended recipient must complete the use and non-disclosure agreement at 227.403-7 prior to release or disclosure

of the limited rights data.

(d) Specifically negotiated license rights. (1) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in data in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item, component, or process, including logistics support and other factors which may have relevance for a particular procurement. The Government may accept lesser rights when it has unlimited or government purpose rights in data but may not accept less than limited rights in such data. The negotiated license rights must stipulate what rights the Government has to release or disclose the data to other persons or to authorize others to use the data. Identify all negotiated rights in a license agreement made part of the contract.

(2) When the Government needs additional rights in data acquired with government purpose or limited rights. the contracting officer must negotiate with the contractor to determine whether there are acceptable terms for transferring such rights. Generally, such negotiations should be conducted only when there is a need to disclose the data outside the Government or if the additional rights are required for competitive reprocurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating for additional rights in limited rights data, consider alternatives such as-

(i) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items, components, or

processes:

(ii) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the

sources:

(iii) Reverse engineering, or providing items from Government inventories to contractors who request the items to facilitate the development of equivalent items through reverse engineering.

§ 227.403-6 Contract clauses.

(a) Use the clause at 252.227-7013. "Rights in Technical Data-Noncommercial Items" in solicitations and contracts when the successful offeror(s) will be required to deliver technical data to the Government. Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.5), commercial items (see 227.402-3), existing works (see 227.405), or special works (see 227.406); in Architect-Engineer and construction contracts (see 227.407); or, when contracting under the Small Business Innovative Research Program (see 227.404).

(b) Use the clause with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would

(1) In the interest of the Government; and.

(2) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(c) Use the clause at 252.227-7016, "Rights in Bid or Proposal Data", in solicitations and contracts when the Government anticipates a need to use, subsequent to contract award, technical data included in a bid or proposal that are not required to be delivered under

the contract.

(d) Use the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends", in solicitations and contracts when it is anticipated that the Government will provide the contractors, for performance of its contract, technical data marked with another contractor's government

restrictive legends.

(e) Use the provision at 252.227-7828, "Technical Data or Computer Software Previously Delivered to the Government", in solicitations when the resulting contract will require the contractor to deliver technical data. The provision requires offerers to identify any technical data specified in the solicitation as deliverable data items that are the same or substantially the same as data items the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor. under any other federal agency contract.

(f) Use the following clauses in solicitations and contracts that include the clause at 252.227-7013:

(1) 252.227-7030, "Technical Data-Withholding of Payment";

(2) 252.227-7036, "Certification of Technical Data Conformity"; and.

(3) 252.227-7037, "Validation of Asserted Restrictions" (paragraph (d) of the clause contains information that must be included in a challenge).

227,403-7 Use and non-disclosure agreement

(a) Except as provided in 227.403-7(b), technical data or computer software delivered to the Government with restrictions on use, modification. reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement at 227.403-7(c) prior to release, or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose technical data subject to limited rights or computer software subject to restricted rights must be stipulated in an attachment to the use and non-

disclosure agreement.

(2) For an intended release, disclosure, or authorized use of technical data or computer software subject to special license rights, modify paragraph 1.(c) of the use and nondisclosure agreement to enter the conditions, consistent with the license requirements, governing the recipient's

obligations regarding use, modification, reproduction, release, performance, display or disclosure of the data or software.

(b) The requirement for use and nondisclosure agreements does not apply to Government contractors which require access to a third party's data or software for the performance of a Government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends."

(c) The prescribed 'Use and Nondisclosure Agreement" is:

Use and Non-disclosure Agreement

The undersigned, _ (Insert Name) en authorized representative of the (Insert Company Name) (which is hereinsfier referred to as the "Recipient") requests the Government to provide the Recipient with technical date or computer software (hereinafter referred to as "Data") in which the Government's use, modification, reproduction, release, performance, display or disclosure rights are restricted. Those Data are identified in an attachment to this Agreement. In consideration for receiving such Data, the Recipient agrees to use the Data strictly in accordance with this Agreement:

(1) The Recipient shall—

(a) Use, modify, reproduce, release. perform, display, or disclose Data marked with government purpose rights or SBIR data rights lends only for government purposes and shall not do so for any commercial purpose. The Recipient shall not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name appears in the restrictive legend (the "Contractor"), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Bata to submit offers for, or perform, contracts with the Recipient. The Recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and non-disclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, er disclose technical data marked with limited rights legends only as specified in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data.

(c) Use computer software marked with restricted rights legends only in performance of contract number. finsert contract . The recipient shall not, number(s)_

for example, enhance, decompile, disassemble, or reverse engineer the software. timeshare, or use of computer program with more than one computer at a time The recipient may not selesse, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrict legend. The Recipient shall promptly notify the software licensor of the execution of this Agreement and identify the suftware that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends (to be completed by the contracting officer. See 227.403-7(a)(2). Omit if none of the Data requested is marked with Special license

rights legends).

(2) The Recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these Data from inadvertent release or disclosure to

unauthorized third parties.

(3) The Recipient agrees to accept these Data "as is" without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Data specified in a contract for the performance of that contract.

(4) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification. reproduction, release, performance, display.

or disclosure of these Data.

(5) The Recipient agrees to indemnify and hold harmless the Government, its agents. and employees from very claim or liability. including ettorneys fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display. or disclosure of Data received from the Government with restrictive legends by the Recipient or any person to whom the Recipient has released or disclosed the Data

(6) The Recipient is executing this Agreement for the benefit of the Contractor. The Contractor is a third party beneficiary of this Agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Data, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(7) The Recipient agrees to destroy these Data, and all copies of the Data in its possession, no later than 30 days after the date shown in paragraph (8) of this Agreement, to have all persons to whom it released the Data do so by that date, and to notify the Contractor that the Data have been destroyed.

(8) This Agreement shall be effective for the period commencing with the Recipient's execution of the Agreement and ending upon

____. The (Incert Date)_ obligations imposed by this agreement shall survive the expiration or termination of this agreement.

Recipient's Business Name

By____

Authorized

Representative _______ Representative's Typed Name and Title Date:

(End of Use and Non-disclosure Agreement)

227.403-8 Deferred delivery and deferred ordering of technical data.

(a) Deferred delivery. Use the clause at 252-227-7026, "Deferred Delivery of Technical Data and Computer Software", when it is in the Government's interests to defer the delivery of technical data. The clause permits the contracting officer to require the delivery of data identified as "deferred delivery" data at any time until two years after acceptance by the Government of all items (other than technical data items) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify which technical data is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such data to permit timely delivery of the data.

(b) Deferred ordering. Use the clause at 252.227-7027, "Deferred Ordering of Technical Data or Computer Software", when a firm requirement technical data has not been established prior to contract award but there is a potential need for the data. Under this clause, the contracting officer may order any technical data that has been generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data expires three years after the date the contractor accepts the last item under the subcontract. When the data are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the technical data into the prescribed form, reproduction costs, and delivery costs.

227.463-8 Copyright.

(a) Copyright license. (1) The clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items", requires a contractor to grant, or obtain for the government license rights which permit the government to reproduce data, distribute copies of the data, publicly

perform or display the data or, through the right to modify data, prepare derivative works. The extent to which the government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When non-standard license rights in technical data will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate a copyright license that provides fewer rights than the standard limited rights license in technical data.

(2) The clause at 252.227-7013 does not permit a contractor to incorporate a third party's copyrighted data into a deliverable data item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third party copyrighted data in which the government will not receive a copyright license only when the -Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the

lack of a copyright license.
(b) Copyright considerations—
Acquisition of existing and special
works. See 227.405 or 227.406 for
copyright considerations when
acquiring existing or special works.

227.403-10 Contractor identification and marking of technical data to be furnished with restrictive markings.

(a) Identification requirements. (1) The solicitation provision at 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions", requires offerors to identify to the contracting officer, prior to contract award, any technical data that the offeror asserts should be provided to the Government with restrictions on use, medification. reproduction, release or disclosure. This requirement does not easily to restrictions based salely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to subswit the Attachment or fails to complete the Attachment in accordance with the requirements of the solicitation provision, such failuse shall constitute a minor informality. Provide offerers an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.465 or 15.607. An offeror's failure to correct the informality within the time prescribed

by the contracting officer shall render the offer imeligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested assested rights category. Questions regarding the justification for an assested restriction or asserted rights category must be pursued in accordance with the procedures at 227.403-13.

(3) The restrictions asserted by a successful offerer shall be attached to its contract unless, in accordance with the procedures at 227.403-13, the parties have agreed that an asserted restriction is not justified. The contract Attachment shall provide the same information regarding identification of the technical data, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision. Subsequent to contract award, the clause at 252.227-7013, "Rights in Technical Data-Noncommercial Items" permits the contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) neither the pre- or post-award assertions made by the contractor nor the fact that certain assertions are identified in the Attachment to the contract, determine the respective rights of the parties. As provided at 227.403—13, the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition or being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror to entitled to provide the technical data with limited nichts.

(b) Contractor marking requirements. the clause at 252.227-7913, "Rights in Technical Data—Noncommercial Items" requires—

(1) A contractor who desires to restrict the Government's rights in technical data to place restrictive markings on the data, provides instructions for the placement of the restrictive markings, and authorizes the use of certain

restrictive markings.

(2) The contractor to deliver, furnish, or otherwise provide to the Government any technical data in which the Government has previously obtained rights with the Government's pre-existing rights in that data unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data with the appropriate restrictive legend for which the data qualified.

(c) Unmarked technical data. (1) Technical data delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see 227.403-10(c)(2)) to correct an inadvertent omission of markings, do not release or disclose the technical data pending evaluation of the

request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data at its expense. The request must be received by the contracting officer within 6 months following the furnishing or delivery of such data, or any extension of that time approved by the contracting officer. The person making the request

(i) Identify the technical data that should have been marked; and,

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data contained in the "Rights in Technical Data—Noncommercial Items" clause at 252.227— 7013: and.

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data made prior to the addition of the marking or resulting from the omission of the

marking.

(3) Contracting officers should grant permission to mark only if the technical data were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.403-11 Contractor procedures and records.

(a) The clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items", requires a

contractor, and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of asserted restrictions on delivered data.

(b) The clause at 252.227-7037, "Validation of Asserted Restrictions", requires contractors and their subcontractors at any tier to maintain records sufficient to justify the validity of restrictive markings on technical data delivered or to be delivered under a Government contract.

227.403-12 Government right to establish conformity of markings.

(a) Nonconforming markings. (1)
Authorized markings are identified in
the clause at 252.227-7013, "Rights in
Technical Data." All other markings are
nonconforming markings. An
authorized marking that is not in the
form, or differs in substance, from the
marking requirements in the clause at
252.227-7013 is also a nonconforming
marking.

(2) The correction of nonconforming markings on technical data is not subject to 252.227-7037, "Validation of Asserted Restrictions". To the extent practicable, the contracting officer should return technical data bearing nonconforming markings to the person who has placed the nonconforming markings on such data to provide that person an opportunity to correct or strike the nonconforming marking at that person's expense. If the person who has placed the nonconforming marking on the technical data fails to correct the nonconformity and return the corrected data within 60 days following the person's receipt of the data, the contracting officer may correct or strike the nonconformity at that person's expense. When it is impracticable to return technical data for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction of the nonconformity, the data may be used in accordance with the proper restrictive marking.

(b) Unjustified markings. (1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data. For example, a limited rights legend placed on technical data pertaining to items, components, or processes that were developed under a Government contract either exclusively

at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding the existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

(i) Strike or correct the unjustified marking at that person's expense; or,

(ii) Return the technical data to the person asserting the restriction for correction at that person's expense. If the data are returned and that person fails to correct or strike the unjustified restriction and return the corrected data to the contracting officer within sixty (60) days following receipt of the data, the unjustified marking shall be corrected or stricken at that person's expense.

227.403-13 Government right to review, verify, challenge and validate asserted restrictions.

(a) General. An offeror's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data do not, by themselves, determine the extent of the Government's rights in the technical data. Under 10 U.S.C. 2321, the Government has the right to challenge asserted restrictions when there are reasonable grounds to question the validity of the assertion and continued adherence to the assertion would make it impractical to later procure competitively the item to which the data pertain.

(b) Pre-award considerations. The challenge procedures required by 10 U.S.C. 2321 could significantly delay awards under competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(c) Challenge and validation.
Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. All challenges must be made in accordance with the provisions of the clause at

252.227-7037, "Validation of Asserted Restrictions".

(1) Challenge period. Asserted restrictions should be reviewed before acceptance of technical data deliverable under the contract. Assertions must be challenged within 3 years after final payment under the contract or three years after delivery of the data, whichever is later. However, restrictive markings may be challenged at any time if the technical data-

(i) Are publicly available without

restrictions:

(ii) Have been provided to the United States without restriction; or,

(iii) Have been otherwise made available without restriction other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another

(2) Pre-challenge requests for information. (i) After consideration of the situations described in 227.403-13(c)(3), contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to determine the validity of the assertion. Additional supporting documentation may be requested when the explanation provided by the person making the assertion does not, in the contracting officer's opinion, establish the validity of the assertion.

(ii) If the person asserting the restriction fails to respond to the contracting officer's request for information or additional supporting documentation or if the information submitted does not justify the asserted restriction, a challenge should be

considered.

(3) Transacting motters directly with subcontractors. The clause at 252,227-7037 obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government when-

(i) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor, or,

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and a failure to respond would jeoperdize a subcontractor's or supplier's right to assert restrictions; or,

(iii) Requested to do so by a subcontractor or supplier.

(4) Challenge notice. Do not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. Assertions may be challenged whether or not supporting documentation was requested from the person asserting the restriction. Challenge notices must be in writing and issued to the contractor or, after consideration of the situations described in 227.403-13(c)(3), the person asserting the restriction. The challenge notice must include the information in paragraph (d) of the clause at 252.227-7037, "Validation of Asserted Restrictions."

(5) Extension of response time. The contracting officer, at his or her discretion, may extend the time for response contained in a challenge notice, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(6) Contracting officer's final decision. Contracting officers must issue a final decision for each challenged assertion, whether or not the assertion has been

(i) A contracting officer's final decision that an assertion is not justified must be issued as soon as practicable following the failure of the person asserting the restriction to respond to the contracting officer's challenge within sixty (60) days, or any extension to that time granted by the contracting officer.

(ii) A contracting officer who. following a challenge and response by the person asserting the restriction, determines that an asserted restriction is justified, shall issue a final decision sustaining the validity of the asserted restriction. If the asserted restriction was made subsequent to submission of the contractor's offer, add the asserted restriction to the contract Attachment.

(iii) A contracting officer who determines that the validity of an asserted restriction has not been justified shall issue a contracting officer's final decision within the time frames prescribed in 252,227-7037. "Validation of Asserted Restrictions." As provided in peregraph (f) of that clause, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the Agency Head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction.

(7) Multiple challenges to an asserted restriction. When more than one

contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to. each challenge.

(8) Validation. Only a contracting officer's final decision, or actions of an agency board of contract appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the

asserted restriction.

227.403-14 Conformity, acceptance, and warranty of technical data.

(a) Statutory requirements. 10 U.S.C. 2320-

(1) Requires contractors to furnish written assurance at the time technical data are delivered or are made available to the Government that the technical data are complete, accurate, and satisfy the requirements of the contract concerning such data;

(2) Provides for the establishment of remedies applicable to technical data found to be incomplete, inadequate, or not to satisfy the requirements of the contract concerning such data; and,

(3) Authorizes agency heads to withhold payments (or exercise such other remedies and agency head considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data

(b) Conformity and acceptance. (1) Solicitations and contracts requiring the delivery of technical data shall specify the requirements the data must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data tendered for acceptance conform to the contractual

requirements.

(2) The clause at 252.227-7030, "Technical Data—Withholding of Payment' provides for withholding up to ten percent of the contract price pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, the amount shall be determined giving

consideration to the relative value and importance of the data. for example—

(i) When the sole purpose of a contract is to produce the data, the relative value of that data may considerably higher than the value of data produced under a contract where the production of the data is a secondary objective; or,

(ii) When the Government will maintain or repair items, repair and maintenance data may have a considerably higher relative value than data that merely describe the item or provide performance characteristics.

(3) Do not accept technical data that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (see $^{-227.403-14(b)(4)}$, correction or replacement of nonconforming data, or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or,

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(4) Follow the procedures at 227.403-12(a)(2) if nonconforming markings are the sole reason technical data fail to conform to contractual requirements. The clause at 252.227-7030 may be used to withhold an amount from payment, consistent with the terms of the clause, pending correction of the

nonconforming markings.

(c) Warranty. (1) The intended use of the technical data and the cost, if any, to obtain the warranty should be considered before deciding to obtain a data warranty (see FAR 46.703). The fact that a particular item, component, or process is or is not warranted is not a consideration in determining whether or not to obtain a warranty for the technical data that pertain to the item, component, or process. For example, a data warranty should be considered if the Government intends to repair or maintain an item and defective repair or maintenance data would impair the Government's effective use of the item or result in increased costs to the Government.

(2) As prescribed in 246.710, use the clause at 252.246-7001, "Warranty of Data", and its alternates, or a substantially similar clause when the Government needs a specific warranty

of technical data.

227.403-15 Subcontractor rights in technical data.

(a) 10 U.S.C. 2320 provides subcontractors at all tiers the same protection for their rights in data as is provided to prime contractors. The clauses at 252.227-7013, "Rights in Technical Data—Noncommercial Items", and 252.227-7037, "Validation of Asserted Restrictions", implement the statutory requirements.

(b) 10 U.S.C. 2321 permits a subcontractor to transact directly with the Government matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data. The clause at 252.227-7037, "Validation of Asserted Restrictions" obtains a contractor's agreement that the direct transaction of validation or challenge matters with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.403-13(c)(3).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers, at all tiers, who will be furnishing technical data in response to a government

requirement.

(1) 252.227-7013, "Rights in Technical Data—Noncommercial Items":

(2) 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

(3) 252.227-7028, "Technical Data or Computer Software Previously Delivered to the Government"; and,

(4) 252.227-7037, "Validation of

Asserted Restrictions".

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the "Rights in Technical Data-Noncommercial Items" clause contained in the contractor's contract with the Government.

227.403-16 Providing technical data to foreign governments, foreign contractors, or international organizations.

Technical data may be released or disclosed to foreign governments,

foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense-

(a) May release or disclose technical data in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those

(b) Shall not release or disclose technical data for which restrictions on use, release, or disclosure have been asserted to foreign entities, or authorize the use of technical data by those entities, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure agreement at 227.403-7 and the requirements of the clause at 252.227-7013 governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.403-17 Overseas contracts with foreign sources.

(a) The clause at 252.227-7032, "Rights in Technical Data and Computer Software (Foreign)" may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see 227.403-17(c)) in lieu of the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items" when the Government requires the unrestricted right to use, modify, reproduce, release, or disclose any technical data to be delivered under the contract. Do not use the clause in contracts for Existing or Special Works.

(b) The clause at 252.227-7032 may be modified to accommodate the needs of a specific overseas procurement situation, provided the Government obtains rights to the technical data that are not less than the rights the Government would have obtained under the data rights clause prescribed in this Part for a comparable procurement performed within the United States or its possessions.

(c) Contracts for Canadian purchases shall include the appropriate data rights clause prescribed in this Part for a comparable procurement performed within the United States or its

possessions.

227.404 Contracts under the Small Business Innovative Research Program.

(a) Use the clause at 252.227-7018, "Rights in Technical Data and Computer Software—Small Business Innovative Research Program", when technical data or computer software will be generated during performance of contracts under

the Small Business Innovative Research

(SBIR) program.

(b) Under that clause, the Government obtains a royalty free license to use technical data marked with an SBIR Data Rights legend only for Government purposes during the period commencing with contract award and ending 5 years after completion of the project under which the data were generated. Upon expiration of the 5 year restrictive license, the Government has unlimited rights in the SBIR data. During the license period, the Government may not release or disclose SBIR data to any person other than-

(1) For evaluational purposes.

(2) As expressly permitted by the

contractor; or,

(3) A use, release, or disclosure that is necessary for emergency repair or overhaul of items operated by the Government.

(c) Do not make any release or disclosure permitted by 227.404(b) unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227-

(d) Use the clause with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would

(1) In the interest of the Government: and.

(2) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(e) Use the following provision and clauses in SBIR solicitations and contracts that include the clause at

252.227-7018:

(1) 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions'

(2) 252.227-7019, "Validation of Asserted Restrictions—Computer Software'

(3) 252.227-7030, "Technical Data-Withholding of Payment";

(4) 252.227-7036, "Certification of

Technical Data Conformity"; and, (5) 252.227-7037, "Validation of Asserted Restrictions" (paragraph (d) of the clause contains information that must be included in a challenge).

(f) Use the following clauses and provision in SBIR solicitations and contracts in accordance with the guidance at 227.403-6 (c), (d), and (e)

(1) 252.227-7016, "Rights in Bid or

Proposal Data"

(2) 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends"; and

(3) 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government."

€ 227.405 Contracts for the acquisition of existing works.

§ 227.405-1 General.

(a) Existing works include motion pictures, television recordings, video recordings, and other audiovisual works in any medium; sound recordings in any medium; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and, works of a similar nature. Usually, these or similar works were not first created, developed, generated, originated, prepared, or produced under a Government contract. Therefore, the Government must obtain a license in the work if it intends to reproduce the work, distribute copies of the work, prepare derivative works, or perform or display the work publicly. When the Government is not responsible for the content of an existing work, it should require the copyright owner to indemnify the Government for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) Follow the procedures at 227.406 for works which will be first created, developed, generated, originated, prepared, or produced under a Government contract and the Government needs to control distribution of the work or has a specific need to obtain indemnity for liabilities that may arise out of the creation, content, performance, use, or disclosure of the work or from libelous or other unlawful material contained in the work. Follow the procedures at 227.403 when the Government does not need to control distribution of such works or obtain such indemnities.

§ 227.405-2 Acquisition of existing works without modification.

(a) Use the clause at 252.227-7021, "Rights in Data—Existing Works" in lieu of the clause at 252.227-7013. "Rights in Technical Data-Noncommercial Items", in solicitations and contracts exclusively for existing works when:

(1) The existing works will be acquired without modification; and,

(2) The Government requires the right to reproduce, prepare derivative works, or publicly perform or display the existing works; or,

(3) The Government has a specific need to obtain indemnity for liabilities that may arise out of the content, performance, use, or disclosure of such

(b) The clause at 252.227-7021, "Rights in Data—Existing Works" provides the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works and publicly perform or display the works called for by a contract and to authorize others to do so for Government purposes.

(c) A contract clause is not required to acquire existing works such as books, magazines and periodicals in any storage or retrieval medium, when the Government will not reproduce the books, magazines or periodicals, or

prepare derivative works.

§ 227.405-3 Acquisition of modified existing works.

Use the clause at 252,227-7020. "Rights in Data—Special Works", in solicitations and contracts for modified existing works in lieu of the clause at 252.227-7021, "Rights in Data-Existing Works."

§ 227.406 Contracts for special works.

(a) Use the clause at 252.227-7020. "Rights in Special Works" in solicitations and contracts where the Government has a specific need to control the distribution of works first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the content, performance, use, or disclosure of such works. Use the clause-

(1) In lieu of the clause at 252.227-7013, "Rights in Technical Data-Noncommercial Items", when the Government must own or control copyright in all works first produced, created, or generated and required to be

delivered under a contract.

(2) In addition to the clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items" when the Government must own or control copyright in a portion of a work first produced, created, or generated and required to be delivered under a contract. The specific portion in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in a special work under the clause at 252.227-7020, the contractor retains use and disclosure rights in that work. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which

specifically restricts the contractor's use

or disclosure rights.

(c) The clause at 252.227-7020 does not permit a contractor to incorporate into a special work any works copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display publicly any portion of the work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

=(d) Examples of works which may be procured under the "Rights in Special Works" clause include, but are not limited, to audiovisual works, computer data bases, computer software documentation, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or, investigative reports.

227.407 Contracts for architect-engineer

This section sets forth policies and procedures, pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

227.407-1 Architectural designs and data clauses for architect-engineer or construction contracts.

(a) Except as provided in 227.407-1(b), use the clause at 252.227-7022. "Government Rights (Unlimited)", in solicitations and contracts for architectengineer services and for construction involving architect-engineer services.

(b) When the purpose of a contract for architect-engineer services or for construction involving architectengineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive

control of the data pertaining to the design by including the clause at 252.227-7023, "Drawings and Other Data to Become Property of Government", in solicitations and contracts.

(c) The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at 252.227-7033, Rights in Shop Drawings.

227.407-2 Contracts for construction supplies and research and development work.

The provisions and clauses required by 227.407-1 shall not be used when the acquisition is limited to-

(a) Construction supplies or materials;

(b) Experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or.

(c) Both.

227.407-3 Approval of restricted designs.

The clause at 252.227-7024, "Notice and Approval of Restricted Designs", may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.408 Contractor data repositories.

(a) Contractor data repositories may be established when permitted by agency procedures. The contractual instrument establishing the data repository must require, as a minimum. the data repository management contractor to-

(1) Establish and maintain adequate procedures for protecting technical data delivered to or stored at the repository from unauthorized release or disclosure;

(2) Establish and maintain adequate procedures for controlling the release or disclosure of technical data from the repository to third parties consistent with the Covernment's rights in such

(3) When required by the contracting officer, deliver data to the Government on paper or in other specified media;

(4) Be responsible for maintaining the currency of data delivered directly by Government contractors or subcontractors to the repository;

(5) Obtain use and non-disclosure agreements (see 227.403-7) from ell persons to whom government purpose rights data is released or disclosed; and,

(6) Indemnify the Government from any liability to data owners or licensors resulting from, or as a consequence, of a release or disclosure of technical data made by the data repository contractor

or its officers, employees, agents, or representatives.

(b) If the contractor is or will be the data repository manager, the contractor's data management and distribution responsibilities must be identified in the contract or the contract must reference the agreement between the Government and the contractor that establishes those responsibilities.

(c) If the contractor is not and will not be the data repository manager, do not require a contractor or subcontractor to deliver technical date marked with limited rights legends to a data repository managed by another contractor unless the contractor or subcontractor who has asserted limited rights agrees to release the data to the repository or has authorized, in writing. the Government to do so.

(d) Repository procedures may provide for the acceptance, delivery, and subsequent distribution of technical data in storage media other than paper, including direct electronic exchange of data between two computers. The procedures must provide for the identification of any portions of the data provided with restrictive legends, when appropriate. The acceptance criteria must be consistent with the authorized delivery format.

Subpart 227.5—Rights in Computer Software and Computer Software **Documentation**

8. A new subpart 227.5 is added to read as follows:

227.5 Rights in computer software and computer software documentation

Sec.

Scope of subpart. 227.500

227.501 Definitions.

227.502 Commercial computer software and commercial computer software documentation.

227.502-1 Policy.

227.502-2 Obtaining commercial computer software or commercial computer software documentation.

227.502-3 Rights in commercial computer software or commercial computer software documentation.

227.502-4 Contract clause.

227.503 Noncommercial computer software and computer software documentation. 227.503-1 Policy.

227.503-2 Acquisition of noncommercial

computer software and computer software documentation. 227.503-3 Early identification of computer software or computer software

documentation to be furnished to the Government with restrictions on use. reproduction, or disclosure.

227.503-4 License rights.

227.503-5 Government rights.

227.503-6 Contract clauses.

227.503-7 [Reserved]

227.503-6 Deferred delivery and deferred ordering of computer software and computer software documentation.

227.503-9 Copyright.

- 227.503-10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.
- 227.503-11 Contractor procedures and records.
- 227.503-12 Government right to establish conformity of markings.
- 227.503-13 Government right to review, verify, challenge, and validate asserted restrictions.
- 227.503-14 Conformity, acceptance, and warranty of computer software and computer software documentation.
- 227.503-15 Subcontractor rights in computer software or computer software documentation.
- 227.503-16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.
- 227.503-17 Overseas contracts with foreign sources.
- 227.504 Contracts under the Small Business Innovative Research Program.
- 227.505 Contracts for special works.
- 227.506 Contracts for architect-engineer services.
- 227.507 Contractor data repositories

227.5 Rights in computer software or computer software documentation.

227.500 Scope of subpart

This subpart—

- (a) Prescribes policies and procedures for the acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclosure such software or documentation. It implements requirements in the following laws and Executive Order:
- 10 U.S.C. 2302(4)
- 10 U.S.C. 2305 (subsection (d)(4))
- 10 U.S.C. 2320
- 10 U.S.C. 2321
- 10 U.S.C. 2325
- Executive Order 12591 (subsection 1(b)(6))
- (b) Does not apply to computer software or computer software documentation acquired under GSA schedule contracts.

227.501 Definitions.

- (a) As used in this subpart, unless otherwise specifically indicated, the terms offeror and contractor include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.
- (b) Other terms used in this subpart are defined in the clause at 252.227-7014, "Rights in Computer Software and Computer Software Documentation."

227.502 Commercial computer software and commercial computer software documentation.

227.502-1 Policy.

- (a) Commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.
- (b) Commercial computer software and commercial computer software documentation shall be obtained competitively, to the maximum extent practicable, using firm fixed price contracts or firm fixed priced orders under available pricing schedules.

(c) Offerors and contractors shall not

be required to-

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made to such software or documentation to meet the requirements of a DoD solicitation;

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.

227.502-2 Obtaining commercial computer software or commercial computer software documentation.

Commercial computer software or commercial computer software documentation shall be acquired, to the maximum extent practicable, using the procedures at 211.70.

227.502-3 Rights in commercial computer software or commercial computer software documentation.

(a) The Government shall have only the rights specified in the license under which the commercial computer software or commercial computer software documentation was obtained.

(b) If the Government has a need for rights not conveyed under the license customarily provided to the public, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the. contract license agreement or an addendum thereto.

227.502-4 Contract clause.

A specific contract clause governing the Government's rights in commercial

computer software or commercial computer software documentation is not prescribed. As required by 227.502-3, the Governments rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation shall be identified in a license agreement.

227.503 Noncommercial computer software and noncommercial computer software documentation.

227.503-1 Policy

(a) DoD policy is to acquire only the computer software and computer software documentation, and the rights in such software or documentation, necessary to satisfy agency needs.

(b) Solicitations and contracts shall-(1) Specify the computer software or computer software documentation to be delivered under a contract and the delivery schedules for the software or documentation;

(2) Establish or reference procedures for determining the acceptability of computer software or computer software

documentation;

(3) Establish separate contract line items, to the extent practicable, for the computer software or computer software documentation to be delivered under a contract and require offerors and contractors to price separately each deliverable data item;

(4) Require offerors to identify, to the extent practicable, computer software or computer software documentation to be furnished with restrictions on the Government's rights and require contractor's to identify computer software or computer software documentation to be delivered with such restrictions prior to delivery

(c) Offerors shall not be required. either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed exclusively at private expense except for the software identified at 227.503-5(a) (3) through

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish computer software developed exclusively at private expense solely because the Government's rights to use, release, or disclose the software may be restricted.

227.503-2 Acquisition of noncommercial computer software and computer software documentation.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that computer software and computer

software documentation requirements included in solicitations are consistent with the policy expressed in 27.503–1.

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition to desired software performance, compatibility, or other technical considerations, needs determinations should consider such factors as multiple site or shared use requirements, whether the Government's software maintenance philosophy will require the right to modify or have third parties modify the software, and any special computer software documentation requirements.

42) When reviewing offers received in response to a solicitation or other request for computer software or computer software documentation, data managers must balance the original assessment of the Government's needs

with prices offered.

(c) Contracting officers are responsible for assuring that, to the maximum extent practicable, solicitations and contracts—

(1) Identify the types of computer software and the quantity of computer programs and computer software documentation to be delivered, any requirements for multiple user at one site or multiple site licenses, and the format and media in which the software or documentation will be delivered;

(2) Establish each type of computer software or computer software documentation to be delivered as a separate contract line item (this requirement may be satisfied by an

Exhibit to the contract):

(3) Identify the prices established for each separately priced deliverable item of computer software or computer software documentation under a fixed price type contract;

(4) include delivery schedules and acceptance criteria for each deliverable

item; and,

(5) Specifically identify the place of delivery for each deliverable item.

227.503-3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) Use the provision at 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions" in all solicitations that include the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation." The provision requires offerors to identify any computer software or computer software documentation for which restrictions, other than copyright, on use,

modification, reproduction, release, performance, display, or disclosure are asserted and to attach the identification and assertion to the offer.

(b) Subsequent to contract award, the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" permits a contractor, under certain conditions, to make additional assertions of restrictions. The prescriptions for the use of that clause and its alternates are at 227.503-6(a)(1).

227.503-4 License rights.

(a) Grant of license. The Government obtains rights in computer software or computer software documentation, including a copyright license, under an irrevocable license granted or obtained by the contractor which developed the software or documentation or the licensor of the software or documentation if the development contractor is not the licensor. The contractor or licensor retains all rights in the software or documentation not granted to the Government. The scope of a computer software license is generally determined by the source of funds used to develop the software. Contractors or licensors may, with some exceptions, restrict the Government's rights to use, release, or disclose computer software developed exclusively or partially at private expense (see 227.503-5 (b) and (c)). They may not, without the Government's agreement (see 227.503-5(d)) restrict the Government's rights in computer software developed exclusively with Government funds or in computer software documentation required to be delivered under a contract.

(b) Source of funds determination.

The determination of the source of funds used to develop computer software should be made at the lowest practicable segregable portion of the software or documentation (eg., a software sub-routine that performs a specific function). Contractors may assert restricted rights in a segregable portion of computer software which otherwise qualifies for restricted rights under the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation."

227.503-5 Government rights.

The standard license rights in computer software that a licensor grants to the Government are unlimited rights,

to the Government are unlimited rights, government purpose rights, or restricted rights. The standard license in computer software documentation conveys unlimited rights. Those rights are defined in the clause at 252.227-7614.

In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) Unlimited rights. The Government obtains an unlimited rights license in—

(1) Computer software developed exclusively with government funds:

(2) Computer software documentation required to be delivered under this contract:

(3) Corrections or changes to computer software or computer software documentation furnished to the contractor by the government;

(4) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(5) Computer software or computer software documentation obtained with unlimited rights under another government contract or as a result of

negotiations; or,

(6) Computer software or computer software documentation furnished to the government, under a government contract or subcontract with—

(i) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or,

(ii) Government purpose rights and the contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(b) Government purpose rights. (1) Except as provided at 227.503-5(a), the Government obtains government purpose rights in computer software developed with mixed funding.

(2) The period during which government purpose rights are effective is negotiable. The clause at 252.227-7014 provides a nominal five year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of

the software without consideration from either party. Longer periods should be negotiated when a five year period does not provide sufficient time to commercialize the software form for software developed by subcontractors, when necessary to recognize the subcontractors interests in the software.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software. Upon expiration of the government purpose rights period, the Government has unlimited rights in the software including the right to permit or authorize others to use the data for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, computer software marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose, or authorize others to release or disclose, computer software in which it has government purpose rights to any person unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at

227.403-7; or,

(ii) The intended recipient is a government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025. "Limitations on the Use or Disclosure of Government Furnished Information Marked with

Restrictive Legends."

(5) When computer software marked with government purpose rights legends will be released or disclosed to a government contractor performing a contract that does not include the clause at 252.227-7025, the contract may be modified, prior to release or disclosure, to include such clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

(6) Contracting activities shall establish procedures to assure that computer software or computer software documentation marked with government purpose rights legends are released or disclosed, including a release or disclosure through a government solicitation, only to persons subject to the use and non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ

company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights software or documentation. Documents transmitting government purpose rights software or documentation to persons under class agreements shall identify the specific software or documentation subject to government purpose rights and the class agreement under which such software or documentation are provided.

(c) Restricted rights. (1) The Government obtains restricted rights in noncommercial computer software required to be delivered or otherwise provided to the government under this contract that were developed exclusively at private expense.

(2) Contractors are not required to provide the Government additional rights in computer software delivered or otherwise provided to the Government with restricted rights. When the Government has a need for additional rights, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. List or describe all software in which the contractor has granted the Government additional rights in a license agreement made part of the contract (see 227.503-5(d)). The license shall enumerate the specific additional rights granted to the Government.

(d) Specifically negotiated license rights. Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in computer software in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in computer software, consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors which may have relevance for a particular procurement. If negotiating to relinquish rights in computer software documentation, consider the administrative burden associated with protecting documentation subject to restrictions from unauthorized release or disclosure. The negotiated license rights must stipulate the rights granted the Government to use, modify, reproduce, release, perform, display, or disclose the software or documentation and the extent to which the Government may authorize others to do so. Identify all negotiated rights in a license agreement made part of the contract.

(e) Rights in derivative computer software or computer software documentation. The clause at 252.227—7014 protects the Government's rights in

computer software, computer software documentation, or portions thereof that the contractor subsequently uses to prepare derivative software or subsequently embeds or includes in other software or documentation. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative software or documentation.

§ 227,503-8 Contract clauses.

(a)(1) Use the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" in solicitations and contracts when the successful offeror(s) will be required to deliver computer software or computer software documentation. Do not use the clause when the only deliverable items are technical data (other than computer software documentation), commercial computer software of commercial computer software documentation, commercial items (see 227.402-3). special works (see 277.505), contracts under the Small Business Innovative Research Program (see 227.404), or in Architect-Engineer and construction contracts (see 227.407).

(2) Use the clause with the Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would

be-

(i) In the interest of the Government; and.

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(b) Use the clause at 252.227-7019
"Validation of Asserted Restrictions—
Computer Software" in solicitations and
contracts that include the clause at
252.227-7014. The clause provides
procedures for the validation of asserted
restrictions on the Government's rights
to use, release, or disclose computer
software.

(c) Use the clause at 252.227-7037, "Validation of Asserted Restrictions", in solicitations and contracts that include the clause at 252.227-7014 when the contractor will be required to deliver noncommercial computer software documentation (technical data). The clause implements statutory requirements under 10 U.S.C. 2321. Paragraph (d) of the clause contains information that must be included in a formal challenge.

(d) Use the clause at 252.227-7016, "Rights in Bid or Proposal Data", in solicitations and contracts when the

Government anticipates a need to use, subsequent to contract award, computer software or computer software documentation included in a bid or proposal that are not required to be delivered under the contract.

(e) Use the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends", in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its centract, computer software or computer software documentation marked with another contractor's restrictive legend(s).

(f) Use the provision at 252.227-7028. "Technical Data or Computer Software Previously Delivered to the. Government", in solicitations when the resulting contract will require the contractor to deliver computer software or computer software documentation. The provision requires offerors to identify any software or documentation specified in the solicitation as deliverable items that are the same or substantially the same as software or documentation which the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any other federal agency contract.

227.503-7 [Reserved]

227.503-8 Deferred delivery and deferred ordering of computer software and computer software documentation.

(a) Deferred delivery. Use the clause at 252.227-7026, "Deferred Delivery of Technical Data and Computer Software", when it is in the Government's interests to defer the delivery of computer software or computer software documentation. The clause permits the contracting officer to require the delivery of data identified as "deferred delivery" data or computer software at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify the computer software or computer software documentation that is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such software or documentation to permit timely delivery.

(b) Deferred ordering. Use the clause at 252.227-7027, "Deferred Ordering of Technical Data or Computer Software", when a firm requirement for softy are or documentation has not been established prior to contract award but there is a potential need for computer software or computer software documentation. Under this clause, the contracting officer may order any computer software or computer software documentation generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the software or documentation are ordered. the delivery dates shall be negotiated and the contractor compensated only for converting the software or documentation into the prescribed form, reproduction costs, and delivery costs.

227.503-9 Copyright.

(a) Copyright license. (1) The clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", requires a contractor to grant, or obtain for the government license rights which permit the government to reproduce the software or documentation, distribute copies, perform or display the software or documentation and, through the right to modify data, prepare derivative works. The extent to which the government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When nonstandard license rights in computer software or computer software documentation will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate copyright licenses for computer software that provide less rights than the standard restricted rights in computer software license. For computer software documentation, do not negotiate a copyright license that provides less rights than the standard limited rights in technical data license.

(2) The clause at 252.227-7013 does not permit a contractor to incorporate a third party's copyrighted software into a deliverable software item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the

Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third party copyrighted software in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) Copyright considerations—special works. See 227.505 for copyright considerations when acquiring special

works.

227.503-10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.

(a) Identification requirements. (1) The solicitation provision at 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions", requires offerors to identify prior to contract award, any computer software or computer software documentation that an offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the Attachment or fails to complete the Attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.607. An offeror's failure to correct an informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.503-13.

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.503—13, the parties have agreed that an asserted restriction is not justified. The contract Attachment shall provide the same information regarding identification of the computer software or computer software documentation, the asserted rights category, the basis for the assertion, and

the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision. Subsequent to the contract award, the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", permits a contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor nor the fact that certain assertions are identified in the Attachment to the contract, determine the respective rights of the parties. As provided at 227.503-13, the Government has the right to review, verify, challenge and validate

restrictive markings.

(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use computer software or computer software documentation.

(b) Contractor marking requirements. The clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software

Documentation" requires-

- (1) A contractor who desires to restrict the Government's rights in computer software or computer software documentation to place restrictive markings on the software or documentation, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings. When it is anticipated that the software will or may be used in combat or situations which simulate combat conditions, do not permit contractors to insert instructions into computer programs that interfere with or delay operation of the software to display a restrictive rights legend or other license notice.
- (2) The contractor to deliver, furnish, or otherwise provide to the Government any computer software or computer software documentation in which the Government has previously obtained rights with the Government's preexisting rights in that software or documentation unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, or disclose the software or documentation have expired. When restrictions are still applicable, the contractor is permitted to mark the software or documentation with the appropriate restrictive legend.

(c) Unmarked computer software or computer software documentation. (1) Computer software or computer software documentation delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see 227.503-10(c)(2)) to correct an inadvertent omission of markings, do not release or disclose the software or documentation pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked computer software or computer software documentation at its expense. The request must be received by the contracting officer within 6 months following the furnishing or delivery of such software or documentation, or any extension of that time approved by the contracting officer. The person making the request

(i) Identify the software or documentation that should have been

marked; and,

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of computer software or computer software documentation contained in the "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause at 252.227-

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the software or documentation made prior to the addition of the marking or resulting from the omission

of the marking

(3) Contracting officers should grant permission to mark only if the software or documentation were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.503-11 Contractor procedures and

(a) The clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" requires a contractor, and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when

authorized and to maintain records to justify the validity of restrictive

markings.

(b) The clause at 252,227-7019, "Validation of Asserted Restrictions-Computer Software", requires contractors and their subcontractors or suppliers at any tier to maintain records sufficient to justify the validity of markings that assert restrictions on the use, modification, reproduction, release, performance, display, or disclosure of computer software.

227.503-12 Government right to establish conformity of markings.

(a) Nonconforming markings. (1) Authorized markings are identified in the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation." All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at 252.227-7014 is also a nonconforming

marking.

(2) The correction of nonconforming markings on computer software is not subject to 252.227-7019, "Validation of Asserted Restrictions—Computer Software" and the correction of nonconforming markings on computer software documentation (technical data) is not subject to 252.227-7037, "Validation of Asserted Restrictions". To the extent practicable, the contracting officer should return computer software or computer software documentation bearing nonconforming markings to the person who has placed the nonconforming markings on the software or documentation to provide that person an opportunity to correct or strike the nonconforming markings at that person's expense. If that person fails to correct the nonconformity and return the corrected software or documentation within 60 days following the person's receipt of the software or documentation, the contracting officer may correct or strike the nonconformity at that person's expense. When it is impracticable to return computer software or computer software documentation for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the software or documentation may be used in accordance with the proper restrictive marking.

(b) Unjustified markings. (1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification,

reproduction, release, or disclosure of the marked computer software or computer software documentation. For example, a restricted rights legend placed on computer software developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose

rights) is an unjustified marking.
(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract. and notwithstanding the existence of a formal challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

(i) Strike or correct the unjustified marking at that person's expense; or,

(ii) Return the computer software or computer software documentation to the person asserting the restriction for correction at that person's expense. If the software or documentation are returned and that person fails to correct or strike the unjustified restriction and return the corrected software or documentation to the contracting officer within sixty (60) days following receipt of the software or documentation, the unjustified marking shall be corrected or stricken at that person's expense.

227.503-13 Government right to review, verify, challenge and validate asserted restrictions.

(a) General. An offeror's or contractor's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose computer software or computer software documentation do not, by themselves, determine the extent of the Government's rights in such software or documentation. The Government may require an offeror or contractor to submit sufficient information to permit an evaluation of a particular asserted restriction and may challenge asserted restrictions when there are reasonable grounds to believe that an assertion is not valid.

(b) Requests for information. Contracting officers should have a reason to suspect that an asserted restriction might not be correct prior to requesting information. When requesting information, provide the offeror or contractor the reason(s) for suspecting that an asserted restriction might not be correct. A need for additional license rights is not, by itself, a sufficient basis for requesting information concerning an asserted

restriction. Follow the procedures at 227.503-5(d) when additional license rights are needed but there is no basis to suspect that an asserted restriction

right not be valid.

(c) Transacting matters directly with subcontractors. The clause at 252.227-7019 obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor or supplier at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government

(1) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor; or,

(2) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or.

(3) Requested to do so by a subcontractor or supplier.

(d) Challenging asserted restrictions. (1) Pre-award considerations. The challenge procedures in the clause at 252.227-7019, "Validation of Asserted Restrictions—Computer Software" could significantly delay competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(2) Computer software documentation. Computer software documentation is technical data.

Challenges to asserted restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software documentation must be made in accordance with the "Validation of Asserted Restrictions" clause, 252.227-7037, and the guidance at 227.403-13. The procedures in that clause implement requirements contained in 10 U.S.C. 2321. Resolution of questions regarding the validity of asserted restrictions using the process described at 227.403-12(b)(2) is strongly encouraged.

(3) Computer software.

(i) Asserted restrictions should be reviewed before acceptance of the computer software deliverable under a contract. The Government's right to challenge an assertion expires 3 years after final payment under the contract or three years after delivery of the software, whichever is later. Those limitations on the Government's

challenge rights do not apply to software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made availa')le without restrictions.

(ii) Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before challenging an asserted restriction, carefully consider all available information pertaining to

the asserted restrictions.

Resolution of questions regarding the validity of asserted restrictions using the process described at 227.503-12(b)(2) is strongly encouraged. After consideration of the situations described in 227.503-13(c), contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to determine the validity of the assertion. Additional supporting documentation may be requested when the explanation provided by that person does not, in the contracting officer's opinion, establish the validity of the assertion.

(iii) Assertions may be challenged whether or not supporting documentation was requested. Challenges must be in writing and issued to the person asserting in

restriction.

(4) Extension of response time. The contracting officer, at his or her discretion, may extend the time for response contained in a challenge, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a

(e) Validating or denying asserted restrictions. (1) Contracting officers must promptly issue a final decision denying or sustaining the validity of each challenged assertion unless the parties have agreed on the disposition of the assertion. When a final decision denying the validity of an asserted restriction is made following a timely response to a challenge, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the Agency Head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction. See 252.227-7019(g) for restrictions applicable following a determination of urgent and compelling circumstances.

(2) Only a contracting officer's final decision, or actions of an agency Board of Contract Appeals or a court of

competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) Multiple challenges to an asserted restriction. When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

§ 227.503-14 Conformity, acceptance, and warranty of computer software and computer software documentation.

(a) Computer software documentation. Computer software documentation is technical data. See 227.403-14 for appropriate guidance and statutory requirements.

(b) Computer software. (1) Conformity and acceptance. Solicitations and contracts requiring the delivery of computer software shall specify the requirements the software must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether computer software tendered for acceptance conforms to the contractual requirements. Except for nonconforming restrictive markings (follow the procedures at 227.503-12(a) if nonconforming markings are the sole reason computer software tendered for acceptance fails to conform to contractual requirements), do not accept software that does not conform in all respects to applicable contractual requirements. Correction or replacement of nonconforming software, or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or,

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(2) Warranties.

(i) Weapon systems. Computer software that is a component of a weapon system or major subsystem

should be warranted as part of the weapon system warranty. Follow the procedures at 246.770.

(ii) Non-weapon systems. Approval of the chief of the contracting office must be obtained to use a computer software warranty other than a weapon system warranty. Consider the factors at FAR 46.703 in deciding whether to obtain a computer software warranty. When approval for a warranty has been obtained, the clause at 252.246-7001, "Warranty of Data", and its alternates, may be appropriately modified for use with computer software or a procurement specific clause may be developed.

§ 227.503.15 Subcontractor rights in computer software or computer software documentation.

(a) Subcontractors and suppliers at all tiers should be provided the same protection for their rights in computer software or computer software documentation as is provided to prime contractors.

(b) The clauses at 252.227-7019, "Validation of Asserted Restrictions-Computer Software" and 252.227-7037, "Validation of Asserted Restrictions" obtain a contractor's agreement that the Government's transaction of validation or challenge matters directly with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.503-13(c) for computer software and 227.403-13(c)(3) for computer software documentation (technical data).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers who will be furnishing computer software in response to a Government requirement (See 227.403-15(c) for clauses required when subcontractors or suppliers will be furnishing computer software documentation (technical data))—

(1) 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation";

(2) 252,227-7019, "Validation of Asserted Restrictions—Computer Software";

(3) 252.227.7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends"; and,

(4) 252.227.7028, "Technical Data or Computer Software Previously Delivered to the Government".

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the provisions of the "Rights in Computer Software and Computer Software Documentation" clause contained in the contractor's contract with the Government.

227.503-16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.

Computer software or computer software documentation may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose computer software or computer software documentation in which it has obtained unlimited rights to such persons or authorize the use of such data by those persons.

(b) Shall not release or disclose computer software or computer software or computer software documentation for which restrictions on use, release, or disclosure have been asserted to such persons, or authorize the use of such data by those persons, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure agreement at 227.403-7 and the requirements of the clause at 252.227-7014 governing use, release, or disclosure of such data have been satisfied.

227.503-17 Overseas contracts with foreign sources.

(a) The clause at 252.227-7032,
"Rights in Technical Data and Computer Software (Foreign)" may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see 252.503-17(c)) in lieu of the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" when the Government requires the unrestricted right to use, modify, reproduce, release, or disclose any computer software or computer software documentation to be delivered

under the contract. Do not use the clause in contracts for Special Works.

(b) The clause at 252.227-7032 may be modified to accommodate the needs of a specific overseas procurement situation, provided the Government obtains rights to the computer software or computer software documentation that are not less than the rights the Government would have obtained under the data rights clause prescribed in this Part for a comparable procurement performed within the United States or its possessions.

(c) Contracts for Canadian purchases shall include the appropriate data rights clause prescribed in this Part for a comparable procurement performed within the United States or its

possessions.

227.504 Contracts under the Small Business Innovative Research Program.

When contracting under the Small Business Innovative Research Program. follow the procedures at 227.404.

227.505 Contracts for special works.

(a) Use the clause at 252.227-7020, "Rights in Data-Special Works" in solicitations and contracts where the Government has a specific need to control the distribution of computer software or computer software documentation first produced, created. or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the content, performance, use, or disclosure of such software or documentation. Use the

(1) In lieu of the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation". when the Government must own or control copyright in all computer software or computer software documentation first produced, created, or generated and required to be

delivered under a contract.

(2) In addition to the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", when the Government must own or control copyright in some of the computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract. The specific software or documentation in which the Government must own or control copyright must be identified in a special contract requirement.

- (b) Although the Government obtains an assignment of copyright and unlimited rights in the computer software or computer software documentation delivered as a special work under the clause at 252.227-7020, the contractor retains use and disclosure rights in that software or documentation. If the Government needs to restrict a contractor's rights to use or disclose the information contained in a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.
- (c) The clause at 252.227-7020 does not permit a contractor to incorporate into a special work any work copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display any portion of that work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.
- (d) Examples of other works which may be procured under this clause include, but are not limited to, audiovisual works, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or, investigative reports.

227.506 Contracts for architect-engineer services.

Follow 227.407 when contracting for architect-engineer services.

227.507 Contractor data repositories.

Follow 227.408 when it is in the Government's interests to have a data repository include computer software er to have a separate computer software repository. Contractual instruments establishing the repository requirements must appropriately reflect the repository manager's software responsibilities.

PART 252-SOLICITATION **PROVISIONS AND CONTRACT** CLAUSES

9. Sections 252.211-7000 through 252.211-7014 and sections 252.211-7018 through 252.211-7021 ere amended by revising the word "item" to

read "product" wherever it appears.

10. Section 252.211-7606(a) is revised

to read as follows:

252.211-7006 Title and risk of losscommercial Name.

- (a) Except for technical data or commercial computer software, title to products furnished under this contract shall pass to the Government upon final acceptance. regardless of when or where the Government takes physical possession, unless this contract specifically provides for earlier passage of title. Title to technical data or commercial computer software shall remain with the contractor unless otherwise specified in this contract. • .
- 11. Section 252.211-7012 is amended by revising paragraph (b); by revising paragraph (c)(1); by redesignating paragraph (c)(2) as paragraph (c)(4); and by adding new paragraphs (c)(2) and (c)(3) to read as follows:

252.211-7012 Certifications-commercial items—competitive acquisitions.

(b) Definitions:

As used in this provision:

(1) The term commercial products includes commercial computer software, commercial computer software documentation, and other commercial items

(2) Commercial items means items, other than computer software, developed or regularly used for other than Government purposes that-

(i) Have been sold, leased, or licensed to

the public; or,

(ii) Have been offered for sale, lease, or

license to the public; or,

(iii) Have not been offered, sold, leased, or licensed to the public, but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the resulting contract; or,

(iv) Satisfy a criterion expressed in (b)(2) (i). or (ii) or (iii) and would require only minor modification to meet the requirements

of the procuring agency.

(3) Commercial computer software means software developed or regularly used for nongovernmental purposes which—
(i) Has been sold, leased, or licensed to the

public; or,

(ii) Has been offered for sale, lease, or

license to the public; or.

(iii) Has not been offered, sold, leased, or licensed to the public, but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the resulting contract; or,

(iv) Satisfy a criterion expressed in (b)(2) (i), or (ii) or (iii) and would require only

minor modification to meet the requirements

of the procuring agency.

(4) Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recomplied. Computer software does not include computer databases or computer software documentation.

(5) Commercial computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the commercial computer software or provide instructions for using the commercial computer software.

(6) Computer database means a collection of recorded data in a form capable of being processed by a computer. The term does not

include computer software.

(7) Computer program means a set of instructions, rules, or other routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(8) Minor modification means:

(i) For commercial items, a modification that does not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process, or is of the type customarily performed in the commercial market place.

(ii) For commercial computer software, a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marker place.

(9) Existing or prior source means entities that are furnishing or previously furnished items or software to the Government, in accordance with Government unique product descriptions, drawings, or specifications, that have not been sold to the public and are being replaced by commercial items or commercial computer software.

(c) The offeror (insert name of offeror) hereby certifies that:

(1) The product(s) offered are commercial items or commercial computer software documentation that satisfy the criteria at paragraph—

 $\{b\}\{2\}\{i\};$
 (b)(2)(ii);
 (b)(2)(iii):
 (0)(2)(11)

(b)(2)(iv) of this provision.

The product(s) offered are commercial computer software that satisfy the criteria at paragraph(s)—

11137	
(b)(3)(i);	
(b)(3)(ii);	
(b)(3)(iii);	or
	(b)(3)(i); (b)(3)(ii);

(b)(3)(iv) of this provision.

(3) The product(s) offered in response to this solicitation is (are)—

_____ Identical to the product(s)
previously furnished to the Government; or,

_____ A minor modification of a product(s) previously furnished to the Government.

252.211-7015 [Removed and Reserved]

12. Section 252.211-7015 is removed and reserved.

252.211-7016 [Removed and Reserved]

13. Section 252.211-7016 is removed and reserved.

252.211-7017 [Removed and Reserved]

14. Section 252.211-7017 is removed and reserved.

252.222-7021 [Amended]

15. Section 252.211-7021(b)(1) is amended by adding an additional clause at the end of the clause list reading "252.227-7015 Technical Data—Commercial Items."

16. Section 252.227–7013 is revised to read as follows:

252.227-7013 Rights in technical data— Noncommercial items.

As prescribed in 227.403-6(a), use the following clause:

RIGHTS IN TECHNICAL DATA— NONCOMMERCIAL ITEMS (XXX 1994)

(a) Definitions. As used in this clause:

(1) Computer data base means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) Computer program means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of

operations.

(3) Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(6) Developed means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered

"developed", the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(7) Development exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed price contracts, when total costs are greater than the firm fixed price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(8) Developed exclusively with government funds means development was not accomplished exclusively or partially at

private expense.

(9) Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(10) Form, fit, and function data means technical data that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(11) Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multinational defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

(12) Government purpose rights means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data within the government without restriction; and.

(ii) Release or disclose technical data outside the government and authorize persons to whom release or disclosure has been to use, modify, reproduced, release, perform, display, or disclose that data for United States government purposes.

(13) Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the government, use the technical data for manufacture, or authorize the technical data to be used by another party.

except that the Government may reproduce, release or disclose such data by persons outside the government if reproduction, release, disclosure, or use is-

(i) Necessary for emergency repair and

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for avaluation or informational purposes; and,

(iii) Subject to a prohibition on the further reproduction, release, disclosure, or use of

the technical data; and,

(iv) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(14) Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(15) Unlimited rights means rights to use. modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others

to do so

(b) Rights in technical data. The contractor grants or shall obtain for the government the following royalty free, worldwide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see 252.227-7014 for rights in computer software documentation):

(1) Unlimited rights. The Government shall have unlimited rights in technical data that

(i) Data pertaining to an item, component. or process which has been or will be developed exclusively with government

(ii) Studies, analyses, test data, or similar data produced for this contract, when the study, englysis, test, or similar work was specified as an element of performance.

(iii) Created exclusively with government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(iv) Form, fit, and function data:

(v) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data):

(vi) Corrections or changes to technical data furnished to the contractor by the

(vii) Otherwise publicly available or have been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure, other than a release or disclosure resulting from the sale. transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(viii) Data in which the Government has obtained unlimited rights under another government contract or as a result of

negotiations: or

(ix) Data furnished to the government, under this or any other government contract or subcontract thereunder, with:

(A) Government purpose license rights or limited rights and the restrictive condition(s)

has/heve empired: or.

(B) Government purpose rights and the contractor's exclusive right to use such data for commercial purposes has expired.

(2) Government purpose rights. (i) The Government shall have government purpose rights for a five year period, or such other period as may be negotiated, in technical

(A) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data as provided in (b)(ii) and (b)(iv) through (b)(ix) of this clease: or.

(B) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items,

components, or processes.

(ii) The five year period, or such other period as may have been aegotisted, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes or creation of the data described in (b)(2)(i)(B). Upon expiration of the five year or other negotiated period, the Government shall have unlimited rights in the technical

(iii) The Government shall not release or disclose technical data in which it has government purpose rights unless-

(A) Prior to release or disclosure, the intended recipient is subject to the nondisclosure agreement at 227.403-7; or,

(B) The recipient is a government contractor receiving access to the data for performance of a government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

(iv) The contractor has the exclusive right, including the right to license others, to use technical data in which the government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (f)(2) of this clause.

(3) Limited Rights. (i) Except as provided in subparagraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause, the Government shall have limited rights in

technical date-

(A) Pertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or,

(B) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or process

(ii) The Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all

copies in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the data have been destroyed.

(iii) The contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, or disclose technical data furnished to the Government with limited rights. However, if the Government desires to obtain additional rights in technical data in which it has limited rights, the contractor agrees to promptly enter into negotiations with the contracting officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data

(4) Specifically negotiated license rights. The standard homse rights granted to the Government under subparagraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in paragraph (a)(13) of this clause. Any nights so negotiated shall be identified in a license agreement made part

of this contract.

(5) Prior government rights. Technical data that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered. furnished, or provided with the pre-existing rights, unless

(i) The parties have agreed otherwise: or. (ii) Any restrictions on the Government's rights to use, modify, reproduce, release. perform, display, or disclose the data have

expired or no longer apply.

(6) Release from liability. The contractor agrees to release the Government from liability for any release or disclosure of technical data made in accordance with paragraphs (a)(13) or (b)(2)(iii) of this clause. in accordance with the terms of a license negotiated under (b)(4) of this clause, or by others to whom the recipient has released or disclosed the data and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed. displayed, or disclosed contractor data marked with asstrictive legends.

(c) Contractor rights in technical data. All rights not granted to the government are

retained by the contractor.

(d) Third party copyrighted data. The contractor shall not, without the written approval of the contracting officer, incorporate any copyrighted data in the technical data to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data of the appropriate scope set forth in paragraph (b) of this clause, and has affixed a statement of the license or licenses

obtained on behalf of the Government and other persons to the data transmittal document.

(e) Identification and delivery of data to be furnished with restrictions on use, release, or disclosure. (1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in subparagraph (e)(3) of this clause, technical data that the contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure are identified in an Attachment

to this contract ("the Attachment"). The contractor shall not deliver any data with restrictive markings unless the data are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent emissions unless the inadvertent emissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the contracting officer

as soon as practicable prior to the scheduled date for delivery of the data, in the following format, and signed by an official authorized to contractually obligate the contractor:

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data. The contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data should be restricted—

Technical Data to be furnished With Restrictions*

Basis for Assertion**

Asserted Rights Category***

Name of Person Asserting Restrictions****

(LIST)

(LIST)

*If the assertion is applicable to items, components, or processes developed at

private expense, identify both the date and each such item, component, or process.

**Generally, the development of an item, component, or process at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data pertaining to such items, components, or processes. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited or government purpose rights under this or a prior contract, or specifically negotiated

licenses).

* * * * Corporation, individual, or other person, as appropriate.

Date Printed Name and Title

Signature "

(End of Identification and Assertion)

(4) When requested by the contracting officer, the contractor shall provide sufficient information to enable the contracting officer to evaluate the contractor's assertions. The contracting officer reserves the right to add the contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the "Validation of Restrictive Markings on Technical Data" clause of this contract.

(f) Marking requirements. The contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: The Government purpose rights legend at subparagraph (f)(2); the limited rights legend at subparagraph (f)(3) of this clause; or, the special license rights legend at subparagraph (f)(4); and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(LIST)

(LIST)

(1) General marking instructions. The contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all technical data that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Reproductions of technical data or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) Government purpose rights markings. Data delivered or otherwise furnished to the Government with Government purposes rights shall be marked as follows:

"GOVERNMENT PURPOSE RIGHTS

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the clause at 252.227-7013 contained in the shove identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(3) Limited sights markings. Data delivered or otherwise farnished to the Government with limited rights shall be marked with the following legend:

"LIMITED RIGHTS

Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the clause at 252.7013 contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also approduce the markings. Any

person, other than the Government, who has been provided access to such data must promptly notify the above named contractor."

(End of Legend)

(4) Special license rights markings. (i) Data in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

"Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by contract no. _____(Insert contract number) _____,

license no. _____(Insert license identifier) _____. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(ii) For purposes of this clause, special licenses do not include Government purpose license rights acquired under a prior contract (see subparagraph (b)(5) of this clause).

f5) Pre-existing data markings. If the terms of a prior contract or license permitted the contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data deliverable under this contract, and those restrictions are still applicable, the contractor may mark such data with the appropriate restrictive legend for which the data qualified under the prior contract or license. The marking procedures in subparagraph (f)(1) of this clause shall be followed.

[g] Contractor procedures and records.

Throughout performance of this contract, the contractor and its subcontractors or suppliers that will deliver technical data with other than well discontractors.

then unlimited rights, shall-

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and,

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data delivered under this contract.

(h) Removal of unjustified and nonconforming markings. (1) Unjustified technical data markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data furnished or to be furnished under this contract are contained in the clause at 252.227-7037, "Validation of Restrictive Markings on Technical Data"

foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

(11) Government purpose rights means the rights to -

(i) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the government without restriction; and,

(ii) Release or disclose computer software or computer software documentation outside the government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States government purposes.

(12) Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

(13) Noncommercial computer software means software that does not qualify as commercial computer software under (a)(1) of this clause.

(14) Restricted rights apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause.

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in subparagraphs (a)(14)(i) and (iii) of this clause;

(B) Not release or disclose the modified software except as provided in subparagraphs (a)(14)(ii), (v) and (vi) of this clause.

(v) Permit contractors or subcontractors performing service contracts (see FAR 37.101) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) the government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the use and non-disclosure

agreement at 227.403—7 or are government contractors receiving access to the software for performance of a government contract that contains the clause at 252.227—7025, "Limitations on the Use or Disclosure of government Purnished Information Marked with Restrictive Legends";

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the government pursuant to subparagraph (a)(14)(iv) of this clause, for any other purpose; and,

(D) Such use is subject to the limitation in subparagraph (a)(14)(i) of this clause.

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

overhaul made, provided that—
(A) The intended recipient is subject to the use and non-disclosure agreement at 227.403—7 or is a government contractor receiving access to the software for performance of a government contract that contains the clause at 252.227—7025, "Limitations on the Use or Disclosure of government Furnished Information Marked with Restrictive Legends"; and

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the government pursuant to subparagraph (a)(14)(iv) of this clause, for any other purpose.

(15) Unlimited rights, means rights to use, modify, reproduce, release, perform, display, or disclose, computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) Rights in computer software or computer software documentation. The contractor grants or shall obtain for the government the following royalty free, worldwide, nonexclusive, irrevocable license rights in noncommercial computer software or computer software documentation. All rights not granted to the government are retained by the contractor.

(1) Unlimited rights. The government shall have unlimited rights in:

(i) Computer software developed exclusively with government funds;

(ii) Computer software documentation required to be delivered under this contract;

(iii) Corrections or changes to computer software or computer software documentation furnished to the contractor by the government:

(iv) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further use, release or disclosure, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party:

(v) Computer software or computer software documentation obtained with unlimited rights under another government contract or as a result of negotiations; or.

(vi) Computer software or computer software documentation furnished to the government, under this or any other government contract or subcontract thereunder with—

(A) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired, or.

(B) Government purpose rights and the contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(2) Government purpose rights.

(i) Except as provided in paragraph (b)(1) of this clause, the government shall have government purpose rights in computer software developed with mixed funding.

(ii) Government purpose rights shall remain in effect for a period of five years unless a different period has been negotiated. Upon expiration of the five year or other negotiated period, the government shall have unlimited rights in the computer software or computer software documentation. The government purpose rights period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software.

(iii) The government shall not release or disclose computer software in which it has government purpose rights to any other person unless:

(A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227,403-7; or.

(B) The recipient is a government contractor receiving access to the software or documentation for performance of a government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends."

(3) Restricted rights. (i) The government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the government under this contract that were developed exclusively at private expense.

(ii) The contractor, its subcontractors, or suppliers are not required to provide the government additional rights in noncommercial computer software delivered or otherwise provided to the government with restricted rights. However, if the government desires to obtain additional rights in such software, the contractor agrees to promptly enter into negotiations with the contracting officer to determine whether there are acceptable terms for transferring such rights. All noncommercial computer software in which the contractor has granted the government additional rights shall be listed or described in a license agreement made part of the contract (see paragraph (b)(4) of this clause). The license shall enumerate the additional rights granted the

(4) Specifically negotiated license rights. (i) The standard license rights granted to the

(ii) Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) Prior government rights. Computer software or computer software documentation that will be delivered. furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, יושופיי

(i) The parties have agreed otherwise; or, (ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have

expired or no longer apply.

(6) Release from liability. The contractor agrees to release the government from liability for any release or disclosure of computer software made in accordance with subparagraphs (a)(14), or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under (b)(4) of this clause, or by others to whom the recipient has released or disclosed the software, and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed contractor software marked with restrictive legends.

(c) Rights in derivative computer software or computer software documentation. The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the contractor uses to prepare, or includes in, derivative computer software or computer software documentation.

(d) Third party copyrighted computer software or computer software documentation. The contractor shall not, without the written approval of the contracting officer, incorporate any copyrighted computer software or computer software documentation in the software or documentation to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable software or documentation of the appropriate scope set forth in paragraph (b) of this clause, and prior to delivery of such-

(1) Computer software, has provided a statement of the license rights obtained in a form acceptable to the contracting officer; or,

(2) Computer software documentation, has affixed to the transmittal document a statement of the license rights obtained.

(e) Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure.

(1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in subparagraph (e)(3) of this clause, computer software that the contractor asserts should be furnished to the government with restrictions on use. release, or disclosure is identified in an Attachment to this contract ("the Attachment"). The contractor shall not deliver any software with restrictive markings unless the software is listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the contracting officer as soon as practicable prior to the scheduled date for delivery of the software, in the following format, and signed by an official authorized to contractually obligate the contractor:

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software. The contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be

restricted-

Asserted Rights Category *** Basis for Assertion **

Names of Person Asserting Restriction: **

nished With Restrictions (LIST)

Computer Software to be Fur-

(LIST)

(LIST)

(LIST)

 Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

• * Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the government's rights should be restricted.

*** Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR software generated under another contract, or specifically negotiated licenses).

**** Corporation, individual, or other person, as appropriate.

Date Printed Name and Title

(End of Identification and Assertion)

(4) When requested by the contracting officer, the contractor shall provide sufficient information to enable the contracting officer to evaluate the contractor's assertions. The contracting officer reserves the right to add the contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of

the "Validation of Asserted Restrictions-Computer Software" clause of this contract.

(f) Marking requirements. The contractor, and its subcontractors or suppliers, may only assert restrictions on the government's rights to use, modify, reproduce, release, or disclose computer software by marking the deliverable software or documentation subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at subparagraph (f)(2); the restricted rights legend at subparagraph (f)(3) of this clause; or, the special license rights legend at subparagraph (f)(4); and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) General marking instructions. The contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all computer software that qualify for such markings. The authorized legends shall be placed on the storage container or the software and each page, or portions thereof, of printed materials containing computer software for which restrictions are asserted. Instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use

of the computer software shall not be inserted in the software, or otherwise cause such interference or delay, unless the contracting officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of computer software or any portions thereof subject to asserted restrictions, shall also reproduce the asserted restrictions.

(2) Government purpose rights markings. Computer software delivered or otherwise furnished to the government with government purpose rights shall be marked as follows:

"GOVERNMENT PURPOSE RIGHTS

Contract No.	
Contractor Name -	
Contractor Address	

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the clause at 252.227-7014 contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings.'

(End of Legend)

(3) Restricted rights markings. Software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

"RESTRICTED RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the clause at 252.277-7014 contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named contractor."

(End of Legend)

(4) Special license rights markings. (i) Computer software or computer software documentation in which the government's rights stem from a specifically negotiated license shall be marked with the following legend:

"Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by contract no. _____(Insert contract number)

license no. (Insert license identifier). Any reproduction of computer software, computer software documentation, or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see subparagraph (b)(5) of this clause).

(5) Pre-existing markings. If the terms of a prior contract or license permitted the contractor to restrict the government's rights to use modify, release, perform, display, or disclose computer software or computer software documentation and those restrictions are still applicable, the contractor may mark such software or documentation with the appropriate restrictive legend for which the software qualified under the prior contract or license. The marking procedures in subparagraph (f)(1) of this clause shall be followed.

(g) Contractor procedures and records.

Throughout performance of this contract, the contractor and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on computer software or computer software documentation delivered under this contract.

(h) Removal of unjustified and nonconforming markings. (1) Unjustified

computer software or computer software documentation markings. The rights and obligations of the parties regarding the validation of restrictive markings on computer software of computer software documentation furnished or to be furnished under this contract are contained in the clauses at 252.227-7019, "Validation of Asserted Restrictions—Computer Software" or 252.227-7037, "Validation of Restrictive Markings on Technical Data", respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or cancel a marking if, in accordance with the procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) Nonconforming computer software or computer software documentation markings. A nonconforming marking is a marking placed on computer software or computer software documentation delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to 252.227-7019 or 252.227-7037. If the contracting officer notifies the contractor of a nonconforming marking or markings and the contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) Relation to patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(i) Limitation on charges for rights in computer software or computer software documentation. (1) The contractor shall not charge to this contract any cost, including but not limited to license fees, royalties, or similar charges, for rights in computer software or computer software documentation to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the software or documentation; or,

(ii) The software or documentation are available to the public without restrictions.

(2) The limitation in paragraph (j)(1)—
(i) Includes costs charged by a
subcontractor or supplier, at any tier, or costs
incurred by the contractor to acquire rights
in subcontractor or supplier computer
software or computer software
documentation, if the subcontractor or
supplier has been paid for such rights under
any other Government contract or under a
license conveying the rights to the
Government;

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the software or documentation will be delivered.

(k) Applicability to subcontractors or suppliers. (1) Whenever any computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the government under this contract, the

contractor shall use this same clause in its subcontracts or other contractual instruments, and require its subcontractors appliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the government's, the contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) The contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) The contractor shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (e) of this clause.

(4) In no event shall the contractor use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the government.

(End of clause)

ALTERNATE I (XXX 1994)

As prescribed in 227.503-6(a)(2), add the following paragraph to the basic clause:

(1) Publication for sale.

(1) This paragraph only applies to computer software or computer software documentation in which the government has obtained unlimited rights or a license to make an unrestricted release of the software or documentation.

(2) The government shall not publish a deliverable item or items of computer software or computer software documentation identified in this contract as being subject to paragraph (!) of this clause or authorize others to publish such software or documentation on its behalf if, prior to publication for sale by the government and within twenty-four (24) months following the date specified in this contract for delivery of such software or documentation, or the removal of any national security or export control restrictions, whichever is later, the Contractor publishes that item or items for sale and promptly notifies the contracting officer of such publication(s). Any such publication shall include a notice identifying the number of this contract and the government's rights in the published software or documentation.

(3) This limitation on the government's right to publish for sale shall continue as long as the software or documentation are reasonably available to the public for purchase.

(END OF ALTERNATE I)

18. Section 252.227-7015 is added to read as follows:

252.227-7015 Technical data—commercial items.

As prescribed in 227.402-3, use the following clause:

TECHNICAL DATA—COMMERCIAL ITEMS (XXX 1994)

(a) Definitions. As used in this clause:

(1) Communicial items means items, other than computer software, developed or regularly used for other than governmental purposes that-

(i) Have been sold, leased, or licensed to

the public; or,

(ii) Have been offered for sale, lease, or

license to the public; or,

(iii) Have not been offered, sold, leased, or licensed to the public but will be available for commercial sale or license in time to satisfy the delivery requirements of this. contract; or,

(iv) Satisfy e criterion expressed in (b) (1), (2), or (3) and would require only minor modification to meet the requirements of the

procuring agency.

(2) Contrator includes the contractor's -subcontractors and suppliers at any tier.

- (3) Form, fit, and function data means technical data that describes the required overall physical, functional and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary :- permit identification of physically and functionally interchangeable items.

(4) Minor modification means a modification that does not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process, or is of the type customarily performed in the commercial market place.

(5) Technical data means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to centract administration, such as financial and/or management information.

(b) License. (1) The Government shall have the unrestricted right to use, modify, reproduce, release, or disclose technical data. and to permit others to do so, that-

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further dischaure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the contractor by the Government: or.

(iv) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, or disclose the data without restrictions.

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, or disclose technical data within the Government only. The Government shall not-

(i) Use the technical data to manufacture edditional quantities of the commercial items; or,

(ii) Release, disclose, or authorize use of the technical data outside the Government without the contractor's express permission unless a release, disclosure or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this

(c) Additional license rights. The contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, or disclose technical data. However, if the Government desires to obtain additional rights in technical data, the contractor agrees to promptly enter into negotiations with the contracting officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the contractor has granted the Government additional rights shall be listed or described in a special license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data.

(d) Release from liability. The contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of technical data that are not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display,

or disclosure restrictions.

(End of Clause)

19. Section 252.227-7016 is added to read as follows:

252.227-7016 Rights in bid or proposal

As prescribed in 227.403-6(c), 227.404(f), or 227.503-6(d), use the following clause:

RIGHTS IN BID OR PROPOSAL DATA (XXX

(a) Definitions.

(1) As used in this clause the term data means technical data or computer software.

(2) For contracts that require the delivery of technical data, the terms technical data and computer software are defined in the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items" or, if this is a contract awarded under the under Small business Innovative Research Program, the clause at 252.227-7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(3) For contracts that do not require the delivery of technical data, the term computer software is defined in the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" or, if this is a contract awarded under the under the Small business Innovative Research Program, the clause at 252.227-7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(b) Prior to contract award-

(1) The offeror agrees that the Government may reproduce the bid or proposal, or any

portions thereof, to the extent necessary to evaluate the offer.

(2) Except as provided in paragraph (d) of this clause, the Government shall use information contained in the bid or proposal only for evaluational purposes and may not disclose, directly or indirectly, such information to any person including potential evaluators, unless that person has been authorized by the Head of the Agency, his or her designee, or the contracting officer to receive such information.

(c) Subsequent to contract award-(1) Except as provided in paragraphs (c)(2) and (d) of this clause, the Government shall have the rights to use, modify, reproduce, release, perform, display, or disclose information contained in the contractor's bid or proposal within the Government. The Government shall not release, perform, display, or disclose such data outside the Government without the contractor's written

permission.

(2) The Government's rights in Data that are required to be delivered under this contract are determined by the "Rights in Technical Data—Noncommercial Items". "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", or "Rights in Noncommercial Technical Deta and Computer Software—Small Business Innovative Research Programs" clause(s) of this contract.

(d)(1) The Government's rights with respect to Data contained in the contractor's bid or proposal that were provided to the contractor by the Government are subject only to restrictions on use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by the developer or licensor of such Data.

(2) The Government's rights, including the right to permit others to use, modify, reproduce, release, perform, display, or, disclose bid or proposal Data, shall not be restricted in any manner if such Data has been otherwise provided to the Government or to other persons without restrictions on further release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of the business entity or its assets to another party.

(e) The contractor shall include this clause in all subcontracts or similar contractual instruments and require its subcontractors or suppliers to do so without alteration, except

to identify the parties. (END OF CLAUSE)

20. Section 252.227-7017 is added to read as follows:

252_227-7017 Identification and Assertion of Use, Release, or Disclosure Restrictions.

As prescribed in 227.403-3(b), 227.404(e), or 227.503-3(a), use the following provision:

IDENTIFICATION AND ASSERTION OF USE, RELEASE, OR DISCLOSURE **RESTRICTIONS (XXX 1994)**

(a) The terms used in this provision are defined in following clause or clauses contained in this solicitation(1) If a successful offeror will be required to deliver technical data, the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items" or, if this solicitation contemplates a contract under the Small Business Innovative Research Program, the clause at 252.227-7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(2) If a successful offeror will not be required to deliver technical data, the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" or, if this solicitation contemplates a contract under the Small Business Innovative Research Program, the clause at 252.227-7018, "Rights in Noncommercial Technical

Data and Computer Software—Small Business Innovative Research Programs".

(b) The notification and identification requirements in this provision apply only to technical data, including computer software documentation, or computer software to be delivered with other than unlimited rights. For contracts to be awarded under the Small Business Innovative Research Program, the notification and identification requirements do not apply to technical data or computer software that will be generated under the resulting contract. Notification and identification is not required for restrictions based solely on copyright.

(c) Offers submitted in response to this solicitation shall identify, to the extent known at the time an offer is submitted to the Government, the technical data or computer software that the offeror, its subcontractors or

suppliers, or potential subcontractors or suppliers, assert should be furnished to the Government with restrictions on use, release. or disclosure.

(d) The offeror's assertions, including the assertions of its subcontractors or suppliers or potential subcontractors or suppliers, shall be submitted as an attachment to its offer in the following format, dated and signed by an official authorized to contractually obligate the offeror.

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*

Basis for Assertion**

Asserted Rights Category***

Name of Person Asserting Restrictions****

(LIST)*****

(LIST)

(LIST)

(LIST)

*For technical data (other than computer software documentation) pertaining to items, components, or processes developed at private expense, identify both the deliverable technical data and each such item, component, or process. For computer software or computer software or computer software or documentation identify the software or documentation.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data pertain. The Government's rights in computer software documentation, generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.

Government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited, restricted, or government purpose rights under this or a prior contract, or specially negotiated licenses).

****Corporation, individual, or other person, as appropriate.

*****Enter "none" when all data or software will be submitted without restrictions.

Printed Name and Title

Signature _

(End of Identification and Assertion)

(e) An offeror's failure to submit, complete, or sign the notification and identification required by paragraph (d) of this clause with its offer may render the offer ineligible for award.

(f) If the offeror is awarded a contract, the assertions identified in paragraph (d) of this provision shall be listed in an attachment to that contract. Upon request by the contracting officer, the offeror shall provide sufficient information to enable the contracting officer to evaluate any listed assertion.

(END OF PROVISION)

21. Section 252.227-7018 is revised to read as follows:

252.227-7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Program.

As prescribed in 227.404(a), use the following clause:

RIGHTS IN NONCOMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE— SMALL BUSINESS INNOVATIVE RESEARCH PROGRAM (XXX 1994)

(a) Definitions. As used in this clause:

(1) Commercial computer software means software developed or regularly used for non-governmental purposes which—

(i) Has been sold, leased, or licensed to the public:

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this

contract; or,
(iv) Satisfies a criterion expressed in (a)(1)
(i), (ii), or (iii) and would require only minor modification to meet the requirements of this

(2) Computer database means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) Computer program means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to

perform a specific operation or series of operations.

(4) Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(6) Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(7) Developed means-

(1) (applicable to technical data other than computer software documentation) an item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state where it could be offered for sale or sold on the commercial market, nor must the item. component or process be actually reduced to practice within the meeting of Title 35 of the United States Code.

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that

the program can reasonably be expected to perform its intended purpose.

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose.

(iv) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under

that contract.

(8) Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Unde: fixed price contracts, when total costs are greater than the firm fixed price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(9) Developed exclusively with Government funds means develop was not accomplished exclusively or partially at private expense.

(10) Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/ or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(12) Gene~'ed means technical data or computer so....are first created in the performance of this contract.

(13) Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multinational defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize other to do so.

(14) Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or permit the technical data to be used by another party, except that the Government may reproduce, release or disclose such data or permit the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overheal; or.

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Covernment and is required for evaluational or informational purposes; and,

(iii) Subject to a prohibition on the further reproduction, release, disclosure, or use of

the technical data; and,

(iv) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(15) Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type customarily provided in the commercial marketplace.

(16) Noncommercial computer software means software that does not qualify as commercial computer software under (a)(1)

of this clause.

(17) Restricted rights apply only to noncommercial computer software and mean

the Government's rights to-

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause.

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or

modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in subparagraphs (a)(17) (i) and (iii)

of this clause;

(B) Not release or disclose the modified software except as provided in subparagraphs (a)(17)(ii), (v) and (vi) of this clause.

(v) Permit contractors or subcentractors performing service contracts (see FAR 37.101) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors

or subcontractors was made.

(B) Such contractors or subcontractors are subject to the non-disclosure agreements at 227.403-7 or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Purnished Information Marked with Restrictive Legends";

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to subparagraph (a)(17)(iv) of this clause, for any other purpose; and,

(D) Such use is subject to the limitation in subparagraph (a)(17)(i) of this clause.

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the non-disclosure agreement at 227.403-7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends"; and,

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to subparagraph (a)(17)(iv) of this clause, for

any other purpose.

(18) SBIR data rights mean a royalty free license for the Government, including its support service contractors, to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated and delivered under this contract for any United States government purpose.

(19) Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(20) Unlimited rights, means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have

or authorize others to do so

(b) Rights in technical data and computer software. The contractor grants or shall obtain for the government the following royalty free, worldwide, nonexclusive, irrevocable license rights in technical data or non-commercial computer software. All rights not granted to the Government are retained by the contractor.

(1) Unlimited rights. The Government shall have unlimited rights in technical data, including computer software documentation, or computer software generated under this

contract that are-

(i) Form, fit, and function data; (ii) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to governmentfurnished technical data or computer

(iv) Otherwise publicly available or have been released or disclosed by the contractor

or a subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party:

(v) Data or software in which the Government has acquired previously unlimited rights under another government contract or through a specific license; and

(vi) SBIR data upon expiration of the SBIR

data rights period.

(2) Limited rights. The Government shall have limited rights in technical data, that were not generated under this contract, pertain to items, components or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (f)(1) of this clause, with the legend prescribed in subparagraph (f)(2) of this clause.

(3) Restricted rights in computer software. The government shall have restricted rights in noncommercial computer software required to be delivered or otherwise furnished to the Government under this contract that were developed exclusively at private expense and were not generated

under this contract.

- (4) SBIR data rights. (i) Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (b)(1) of this clause, the Government shall have SBIR data rights in all technical data or computer software generated under this contract during the period commencing with contract award and ending upon the data five years after completion of the project from which such data were generated.
- (ii) The Government may not release or disclose SBIR data to any person, other than its support services contractors, except—
- (A) As expressly permitted by the contractor:

(B) For evaluational purposes; or.

(C) A release, disclosure, or use that is necessary for emergency repair or overhead of items operated by the Government.

(iii) A release or disclosure of SBIR data to the Government's support services contractors, or a release or disclosure under paragraphs (b)(4)(ii)(B) or (c) of this clause, may be made only if, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.403-7 or is a Government contractor receiving access to the technical data or

software for performance of a Government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends."

(5) Specifically negotiated license rights. The standard license rights granted to the government under paragraphs (b)(1) through (b)(4) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but shell not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in paragraph (a)(14) of this clause or lesser rights in computer software than are enumerated in paragraph (a)(17) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(6) Prior Government rights. Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the government under this contract, in which the government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing

rights, unless-

(i) The parties have agreed otherwise; or.

(ii) Any restrictions on the government's rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer

apply.

(7) Release from liability. The contractor agrees to release the Government from liability for any release or disclosure of technical data, computer software, or computer software documentation made in accordance with paragraphs (a)(14), (a)(17), or (b)(4) of this clause, or in accordance with the terms of a license negotiated under paragraph (b)(5) of this clause, or by others to whom the recipient has released or disclosed the data, software, or documentation and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed. displayed, or disclosed contractor data or software marked with restrictive legends.

(c) Rights in derivative computer software or computer software documentation. The government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the contractor uses to prepare, or includes in, derivative software or documentation.

(d) Third party copyrighted technical data and computer software. The contractor shall

not, without the written approval of the contracting officer, incorporate any copyrighted technical data, including computer software documentation, or computer software in the data or software to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data or software of the appropriate scope set forth in paragraph (b) of this clause and, prior to delivery of such—

(1) Technical data, has affixed to the transmittal document a statement of the license rights obtained; or,

(2) Computer software, has provided a statement of the license rights obtained in a form acceptable to the contracting officer.

(e) Identification and delivery of technical data or computer software to be furnished with restrictions on use, release, or disclosure. (1) This paragraph does not apply to technical data or computer software that were or will be generated under this contract or to restrictions based solely on copyright.

(2) Except as provided in subparagraph (e)(3) of this clause, technical data or computer software that the contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an Attachment to this contract ("the Attachment"). The contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the contracting officer as soon as practicable prior to the scheduled date for delivery of the technical data or computer software, in the following format, and signed by an official authorized to contractually obligate the contractor:

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The contractor asserts for itself, or the persons identified below, that the Government's right to use, release, or disclose the following technical data or computer software should be restricted—

Technical date or computer software to be Furnished With Restrictions*

Basis for Assertion**

Asserted Rights Category***

Name of Person Asserting Restrictions****

(LIST)

(LIST)

(LIST)

(LIST)

"If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

**Generally, development at private expense, either exclusively or partially, is the

only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense,

enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., limited rights, restricted rights, government purpose rights, or government purpose license rights from a prior contract, SBIR data rights under another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date
Printed Name and Trade
Signature

(End of Identification and Assertion)

(4) When requested by the contracting officer, the contractor shall provide sufficient information to enable the contracting officer to evaluate the contractor's assertions. The contracting officer reserves the right to add the contractor's assertions to the Attachment and validate any listed assertions, at a later date, in accordance with the procedures of the "Validation of Asserted Restrictions—

Computer Software, and/or "Validation of Restrictive Markings on Technical Data" clauses of this contract.

(f) Marking requirements. The contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data or computer software to be delivered under this contract by marking the deliverable data or software subject to restriction. Except as provided in paragraph (f) (6) of this clause, only the following markings are authorized under this contract: the limited rights legend at subparagraph (f) (2) of this clause; the restricted rights legend at subparagraph (f)(3), the SBIR data rights legend at subparagraph (f)(4), or, the special license rights legend at subparagraph (f)(5); and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) General marking instructions. The contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend to all technical data and computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical date or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling. underscoring, with a note, or other appropriate identifier. Instructions that interfere with or delay the operation of computer software in order to display a restrictive legend or other license statement et any time prior to or during use of the computer software shall not be inserted in the software, or otherwise cause such interference or delay, unless the contracting officer's written permission to deliver such software has been obtained prior to delivery. Reproduction of technical data, computer software, or any portions thereof subject to asserted restrictions shall also reproduce the

asserted restrictions.

(2) Limited rights markings. Technical data not generated under this contract that pertain to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights shall be marked with the following legend:

"LIMITED RIGHTS

Contract No.

Contractor Name
Contractor Address

The Government's right to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the clause at 252.227-7018. Any reproduction of technical data or portions thereof marked with this legend must also produce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named contractor."

(End of Legend)

(3) Restricted rights markings. Computer software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

"RESTRICTED RIGHTS

The Government's right to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the clause at 252.227–7018. Any reproduction of computer software or portions thereof marked with this legend must also produce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named contractor."

(End of Legend)

(4) SBIR data rights markings. Except for technical data or computer software in which the Government has acquired unlimited rights under subparagraph (b)(1) of this clause, or negotiated special license rights as provided in subparagraph (b)(5) of this clause, technical data or computer software generated under this contract shall be marked with the following legend. The contractor shall enter the expiration date for the SBIR data rights period on the legend:

"SBIR DATA RIGHTS

Expiration of SBIR Data Rights
Period

The Government's right to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the contract identified above. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(5) Special license rights markings. (i)
Technical data or computer software in
which the Government's rights stem from a
specifically negotiated license shall be
marked with the following legend:

"Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer

goftware are restricted by contract no. [Insert contract number] _____, license no. _____, (Insert license identifier) _____. An reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(ii) For purposes of this clause, special licenses do not include government Purpose License Rights acquired under a prior contract (see subparagraph (b)(6) of this clause).

(6) Pre-existing data markings. If the terms of a prior contract or license permitted the contractor to restrict the government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The marking procedures in subparagraph (f)(1) of this clause shall be followed.

(g) Contractor procedures and records. Throughout performance of this contract, the contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(b) Removal of unjustified and nonconforming markings. (1) Unjustified markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software furnished or to be furnished under this contract are contained in the clauses at "252.227-7037, "Validation of Restrictive Markings on Technical Data" or 252.227-7019, "Validation of Asserted Restrictions-Computer Software", respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or cancel a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) Nonconforming markings. A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to 252.227-7019 or 252.227-7037. If the contracting officer notifies the contractor of a nonconforming marking or markings and the contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) Relation to patents. Nothing contained in this clause shall imply a license to the Government under any patent or be

construed as affecting the scope of any license or other right otherwise granted to the

Government under any patent.

(j) Limitation on charges for rights in technical data or computer software. (1) The contractor shall not charge to this contract any cost, including but not limited to, license fees, royalties, or similar charges, for rights in technical data or computer software to be delivered under this contract when-

(i) The Government has acquired, by any means, the same or greater rights in the data

or software; or,

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1)—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the contractor to acquire rights in subcontractor or supplier technical data or computer software, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government:

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data or computer software will be

delivered.

(k) Applicability to subcontractors or suppliers. (1) The contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes required by paragraph (e) of this clause are recognized and protected.

(2) Whenever any technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, the contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher-tier contractor. subcontractor, or supplier.

(4) The contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors

or suppliers.

(5) In no event shall the contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to tire Government.

(End of clause)

ALTERNATE I (XXX 1994)

As prescribed in 227.404(c) or 227.504(c), add the following paragraph to the basic clause:

(1) Publication for sale. (1) This paragraph applies only to technical data or computer software delivered to the Government with

SBIR data rights.

(2) Upon expiration of the SBIR data rights period, the Government will not exercise its right to publish or authorize others to publish an item of technical data or computer software identified in this contract as being subject to paragraph (1) of this clause if the contractor, prior to the expiration of the SBIR data rights period, or within two years following delivery of the data or software item, or within twenty-four months following the removal of any national security or export control restrictions, whichever is later. publishes such data or software item(s) and promptly notifies the contracting officer of such publication(s). Any such publication(s) shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the technical data or computer software are reasonably available to the

public for purchase.

(END OF ALTERNATE I)

22. Section 252.227-7019 is revised to read as follows:

252.227-7019 Validation of asserted restrictions-computer software.

As prescribed in 227.503–6(b), use the following clause:

VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE (XXX 1994)

(a) Definitions. (1) As used in this clause. unless otherwise specifically indicated, the term Contractor means the contractor and its subcontractors or suppliers.

(2) Other terms used in this clause are defined in the "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause.

252.227-7014, of this contract.

(b) Justification. The Contractor shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this contract and shall be prepared to furnish to the contracting officer a written justification for such restrictive markings in response to a request for information under paragraph (d) or a challenge under paragraph (f) of this clause.

(c) Direct contact with subcontractors or suppliers. The Contractor agrees that the contracting officer may transact matters under this clause directly with subcontractors or suppliers at any tier who assert restrictions on the Government's right to use, modify, reproduce, release, perform, display, or disclose computer software. Neither this clause, nor any action taken by

the Government under this clause, creates or implies privity of contract between the Government and the Contractor's subcontractors or suppliers.

(d) Requests for information. (1) The contracting officer may request the Contractor to provide sufficient information to enable the contracting officer to evaluate the Contractor's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) Based upon the information provided.

if the-

(i) Contractor agrees that an asserted restriction is not valid, the contracting officer may-

(A) Strike or correct the unjustified marking at the Contractor's expense; or,

(B) Return the computer software to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restriction and return the corrected software to the contracting officer within sixty (60) days following receipt of the software the contracting officer may correct or strike the markings at that Contractor's expense.

(ii) Contracting officer concludes that the asserted restriction is appropriate for this contract, he or she shall so notify the

Contractor in writing.

(3) The Contractor's failure to provide a timely response to a contracting officer's request for information or failure to provide sufficient information to enable the contracting officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

- (e) Government right to challenge and validate asserted restrictions. (1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by the Contractor on the Government's rights to use, modify. reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this contract, or otherwise provided to the Government in the performance of this contract. Except for software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions, the Government may exercise this right only within three years after the date(s) the software is delivered or otherwise furnished to the Government, or three years following final payment under this contract, whichever is later.
- (2) The absence of a challenge to an asserted restriction shall not constitute validation under this clause. Only a contracting officer's final decision or actions of an agency Board of Contract Appeals or a court of competent jurisdiction that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) Challenge procedures. (1) A challenge

must be in writing and shall-

(i) State the specific grounds for challenging the asserted restriction: (ii) Require the Contractor to respond

within sixty (60) days;

(iii) Require the Contractor to provide justification for the assertion based upon records kept in accordance with paragraph (b) of this clause and such other documentation that are reasonably available to the Contractor, in sufficient detail to enable the contracting officer to determine the validity of the asserted restrictions; and,

(iv) State that a contracting officer's final decision, during the three year period preceding this challenge, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by the Contractor (or a licensee) shall serve as justification for the asserted restriction.

(2) The contracting officer shall extend the time for response if the Contractor submits a written request showing the need for additional time to prepare a response.

(3) The contracting officer may request additional supporting documentation if, in his or her opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor agrees to promptly respond to the contracting officer's request for additional supporting documentation.

(4) Notwithstanding challenge by the contracting officer, the parties may agree on the disposition of an asserted restriction at any time prior to a contracting officer's final decision or, if the Contractor has appealed that decision, filed suit, or provided notice of an intent to file suit, at any time prior to a decision by a court of competent jurisdiction or Board of Contract Appeals.

(5) If the Contractor Rais to respond to the contracting officer's request for information or additional information under subparagraph (f)(1) of this clause, the contracting officer shall issue a final decision, in accordance with the "Disputes" clause of this contract, pertaining to the validity of the asserted restriction.

(6) If the contracting officer, after reviewing the written explanation furnished pursuant to subparagraph (f)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that the asserted restriction has—

(i) Not been justified, the contracting officer shall issue promptly a final decision, in accordance with the "Disputes" clause of this contract, denying the validity of the asserted restriction.

(ii) Been justified, the contracting officer shall issue promptly a final decision, in accordance with the "Disputes" clause of this contract, validating the asserted restriction.

(7) A contractor receiving challenges to the same asserted restriction(s) from more than one contracting officer shall notify each contracting officer of the other challenges. The notice shall also state which contracting officer initiated the first in time unanswered challenge. The contracting officer who initiated the first in time unanswered challenge, after consultation with the other contracting officers who have challenged the restrictions and the contractor, shall formulate and distribute a schedule that provides the contractor a reasonable opportunity for responding to each challenge.

(g) Contractor appeal—Government obligation. (1) The Government agrees that,

notwithstanding a contracting officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (g)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the contracting officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the contracting officer's final decision if, within the first ninety (90) days following the contracting officer's final decision, the Contractor has provided notice of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has: (A) appealed to the Board of Contract Appeals or filed suit in an appropriate court within ninety (90) days; or, (B) submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suite within one year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the contracting officer's final decision; or,

(ii) File suit in an appropriate court within ninety (90) days from such date; or,

(iii) File suit within one year after the date of the contracting officer's final decision if the Contractor had provided notice of intent to file suit within ninety (90) days following the date of the contracting officer's final decision.

(3) The agency head, on a non-delegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances.

Notwithstanding subparagraph (e)(1) of this

Notwithstanding subparagraph (g)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with (i) government purpose legends for any purpose, and authorize others to do so; or, (ii) restricted or special license rights for government purposes only. The Government agrees not to release or disclose such software unless prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.403-7; or, is a government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, "Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends." The egency head's determination may be made at any time after the date of the contracting officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted

restrictions are ultimately upheld.
(h) Final disposition of appeal or suit. If the Contractor appeals or files suit and if,

upon final disposition of the appeal or suit. the contracting officer's decision is—

(1) Sustained—:

 (i) Any restrictive marking on such computer software shall be struck or corrected at the Contractor's expense or ignored; and,

(ii) If the asserted restriction is found not to be substantially justified, the Contractor shall be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the restriction, unless special circumstances would make such payment unjust.

(2) Not sustained-

(i) The Government shall be bound by the asserted restriction; and,

(ii) If the challenge by the Government is found not to have been made in good faith, the Government shall be liable to the Contractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A) incurred by the Contractor in defending the restriction.

(i) Flowdown. The contractor shall insert this clause in all contracts, purchase orders, and other similar instruments with its subcontractors or suppliers, at any tier, who will be furnishing computer software to the Government in the performance of this contract. The clause may not be altered other than to identify the appropriate parties.

(End of clause)

23. Section 252.227–7029 is revised to read as follows:

§ 252.227-7020 Rights in special works.

As prescribed in 227.405-3, 227.406(a) and 227.505(a), use the following clause:

RIGHTS IN SPECIAL WORKS (XXX 1994)

- (a) Applicability. The clause applies to works first created, generated, or produced and required to be delivered under this contract.
 - (b) Definitions. As used in this clause:
- (1) Computer data base means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) Computer program means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of computations.

(3) Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer

software documentation.
(4) Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

- (5) Unlimited rights means the rights to use, modify, reproduce, perform, display, release, or disclose a work in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do to.
- (6) The term works includes computer data bases, computer software, or computer software documentation; literary, musical, choreographic, or dramatic compositions; pantomimes; pictorial, graphic, or sculptural compositions; motion pictures and other audiovisual compositions; sound recordings in any medium; or, items of similar nature.

(c) License rights (1) The Government shall have unlimited rights in works first produced, created, or generated and required to be delivered under this contract.

- (2) The contractor shall assign to the Government copyright in all works first produced, created, or generated and required to be delivered under this contract. The contractor, unless directed to the contrary by the contracting officer, shall place the following notice on such works:
- "© (Year date of delivery) United States Government, as represented by the Secretary of (department). All rights reserved." For phonorecords, the "©" marking shall be replaced by a "P".
- (3) The contractor grants to the Government a royalty free, worldwide, nonexclusive, irrevocable license to reproduce, prepare derivative works from, distribute, perform, or display, and to have or authorize others to do so, the contractor's copyrighted works not first produced created, or generated under this contract that have been incorporated into the works deliverable under this contract.
- (d) Third party copyrighted data. The contractor shall not incorporate, without the written approval of the contracting officer, any copyrighted works in the works to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license of the scope identified in paragraph (c)(3) of this clause and, prior to delivery of such works—

(1) Has affixed to the transmittal document a statement of the license rights obtained; or, (2) For computer software, has provided a

statement of the license rights obtained in a form acceptable to the contracting officer.

(e) Indemnification. The contractor shall indemnify and save and hold harmless the government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in such works.

(f) Government furnished information.

Paragraphs (d) and (e) of this clause are not applicable to information furnished to the contractor by the Government and incorporated in the works delivered under this contract.

(End of clause)

252.227-7021 [Amended]

24. Section 252.227-7021 is amended by revising the introductory text to read "As prescribed in 227.405-2(a), use the following clause:".

252.227-7022 [Amended]

25. Section 252.227-7022 is amended by revising the introductory text to read "As prescribed in 227.407-1(a), use the following clause:".

252.227-7023 [Amended]

26. Section 252.227-7023 is amended by revising the introductory text to read "As prescribed in 227.407-1(b), use the following clause:".

252.227-7024 [Amended]

27. Section 252.227-7024 is amended by revising the introductory text to read "As prescribed in 227.407-3, use the following clause:".

28. Section 252.227-7025 is added to read as follows:

252.227-7025 Limitations on the use or disclosure of Government furnished information marked with restrictive legends.

As prescribed in 227–403–6(d) or 227.503–6(e), use the following clause: LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS (XXX 1994)

(a)(1) For contracts requiring the delivery of technical data, the terms limited rights and government purpose rights are defined in the "Rights in Technical Data—Noncommercial Items" clause, 252.227-7013.

(2) For contracts that do not require the delivery of technical data, the terms government purpose rights and restricted rights are defined in the "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause, 252.227-7014.

(3) For Small Business Innovative Research program contracts, the terms limited rights and restricted rights are defined in the clause at 252.227-7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs."

(b) Technical data or computer software provided to the contractor as Government furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) GFI marked with limited or restricted rights legends. The contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such deta or software to any person.

(2) GFI marked with Government purpose rights legends. The contractor shall use technical data or computer software received from the Government with Government purpose rights legends for Government purposes only. The contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release. perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at DFARS 227.403-7.

(3) GFI marked with specially negotiated license rights legends. The contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the non-disclosure agreement at 227.403-7. The contractor shall modify paragraph 1.(c) of the disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(c) Indemnification and creation of third party beneficiary rights. The contractor

agrees:

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of technical data or computer software received from the Government with restrictive legends by the contractor or any person to whom the contractor has released or disclosed such data or software.

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the contractor, or any person to whom the contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of technical data or computer software subject to restrictive legends.

(END OF CLAUSE)

252.227-7026 [Amended]

29. Section 252.227-7026 is amended by revising the introductory text to read "As prescribed in 227.403-8(a), use the following clause:".

252.227-7027 [Amended]

30. Section 252.227-7027 is amended by revising the introductory text to read "As prescribed in 227.403-8(b), use the following clause:".

Street Contraction of the Street

31. Section 252.227-7028 is revised to DEPARTMENT OF THE INTERIOR read as follows:

252.227-7028 Technical data or computer software previously delivered to the Government.

As prescribed in 227.403-6(e) or 227.503-6(f), use the following

TECHNICAL DATA OR COMPUTER SOFTWARE PREVIOUSLY DELIVERED TO THE GOVERNMENT (XXX 1994)

The offeror shall attach to its offer an identification of all documents or others media incorporating technical data or computer software it intends to deliver under this contract with other than unlimited rights that are identical or substantially similar to documents or other media that the offeror has produced for, delivered to, or is obligated to deliver to the Government under any contract or subcontract. The attachment shall ... identify—

(a) The contract number under which the data or software were produced;

(b) The contract number under which, and the name and address of the organization to whom, the data or software were most recently delivered or will be delivered; and

(c) Any limitations on the Government's rights to use or disclose the date or software, including, when applicable, identification of the earliest date the limitations expire. (End of Provision)

252.227-7029 [Removed]

32. Section 252.227-7029 is removed and reserved.

252.227-7030 [Amended]

33. Section 252.227-7030 is amended by revising the introductory text to read "As prescribed in 227.403-6(f)(1), use the following clause:".

252.227-7031 [Removed and Reserved]

34. Section 252.227-7031 is removed and reserved.

252.227-7032 [Removed and Reserved]

35. Section 252.227-7032 is removed and reserved.

252.227-7033 [Amended]

36. Section 252.227-7033 is amended by revising the introductory text to read "As prescribed in 227.407(c), use the following clause:".

252.227-7036 [Amended]

37. Section 252.227-7036 is amended by revising the introductory text to read "As prescribed in 227.403–6(f)(2), use the following clause:".

252.227-7037 [Amended]

38. Section 252.227-7037 is amended by revising the introductory text to read "As prescribed in 227.403]6(f)(3), use the following clause:".

FR Doc. 94-14321 Filed 6-17-94; 8:45 am] BILLING CODE 3810-01-M

Fish and Wildlife Service

50 CFR Part 17

Notice of Availability of Draft Modifications to the Recovery Action Plan for the Recovery Implementation Program for the Endangered Fish Species in the Upper Colorado River

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of draft modifications to the Recovery Implementation Program Recovery Action Plan (RIPRAP) dated October 15, 1993. The RIPRAP identifies specific actions and timeframes currently believed to be necessary to recover the endangered fish in the most expeditious manner possible in the Upper Colorado River Basin (Upper Basin). The Upper Basin is defined as the Colorado River drainage upstream of Lake Powell, with the exception of the San Juan River drainage. The RIPRAP will serve as a measure of accomplishment so the Recovery Program can continue to serve as the reasonable and prudent alternative to avoid the likelihood of jeopardy to the continued existence of the endangered fish for projects undergoing section 7 consultations. Critical habitat for the endangered fish was formally designated on April 20, 1994. The Recovery Program is also intended to serve as the reasonable and prudent alternative to avoid the likely destruction or adverse modification of critical habitat. Therefore, modifications to the RIPRAP are being proposed so the Recovery Program can serve as the reasonable and prudent alternative to avoid adverse modification to critical habitat as well as to avoid the likelihood of jeopardy resulting from depletion impacts of new projects and all existing or past impacts related to historic water projects with the exception of the discharge by historic projects of pollutants such as trace elements, heavy metals, and pesticides. The proposed modifications were developed by FWS in coordination with the Recovery Program's Management Committee. The Service solicits review and comment from the public on the draft changes to the RIPRAP.

DATES: Comments on the revised RIPRAP must be received on or before August 4, 1994.

ADDRESSES: Persons wishing to review the draft RPRAP modifications may obtain copies by contacting the Assistant Regional Director—Ecological Services U.S. Fish and Wildlife Service, P.O. Eox 25486, Denver Federal Center, Denver, Colorado 80225; FAX (303) 236-0027. Written comments should be sent to the address given above. Comments received are available upon request for public inspection, by appointment, during normal business hours at the above address. FOR FURTHER INFORMATION CONTACT: Mr. Robert Jacobsen (see above address), telephone (303) 236-8189.

SUPPLEMENTARY INFORMATION:

Background

Four native fish species that inhabit the Colorado River Basin are federally listed as endangered: the Colorado sqawfish (Ptychocheilus lucius), humpback chub (Gila cypha), bonytail (Gila elegans), and razorback sucker (Xyrauchen texanus). Each of these four species was once abundant in the Upper Basin; however, they have declined in numbers and are now threatened with extinction from their natural habitat. Factors accounting for the current status of these species include direct loss of habitat, changes in water flow and temperature regimes, blockage of migration routes, and interactions with introduced (nonnative) fish species. The Fish and Wildlife Service (Service) has maintained since 1978 that a jeopardy situation exists in the upper Colorado River basin and that actions must be taken to reverse the decline of endangered fish populations and habitat. The Service has described this conclusion through section 7 of the Endangered Species Act (Act) in over 224 biological opinions on project impacts on the endangered fish in the Upper Basin.

in 1988, the Governors of Colorado, Utah, and Wyoming, the Secretary of the Interior, and the Administrator of the Western Area Power Administration entered into a cooperative agreement to implement the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Recovery Program). The purpose of the Recovery Program is to recover the four endangered fish in the Upper Colorado River Basin while providing for future water development to proceed in compliance with the Endangered Species Act, Interstate Compacts, and State law. Participants in the Recovery Program include the Service, the Bureau of Reclamation, the States of Utah, Wyoming, and Colorado, the Western

Lakeland to the Tampa-St. Petersburg-Clearwater, Florida television market.

Initial Regulatory Flexibility Analysis

4. The Commission certifies that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by § 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

Ex Parte

5. This is a non-restricted notice and comment rule making proceeding. Exporte presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR §§ 1.1202, 1.1203 and 1.1206(a).

Comment Dates

6. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties

may file comments on or before September 14, 1994, and reply comments on or before October 14, 1994. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, NW., Washington, D.C. 20554.

7. Accordingly, this action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's Rules.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William H. Johnson,

Acting Chief. Cable Services Bureau.

[FR Doc. 94–20856 Filed 8–24–94; 8:45 am]

BILLING CODE 6712-01-F

DEPARTMENT OF DEFENSE

48 CFR Parts 211, 227, and 252

Defense Federal Acquisition Regulation Supplement; Rights in Technical Data

AGENCY: Department of Defense.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document extends the public comment period for the proposed rule on Rights in Technical Data that the Department of Defense had published on June 20, 1994 (59 FR 31584).

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 9, 1994, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: Deputy Director, Major Policy Initiatives, PDUSD (A&T) DP; ATTN: Ms. Angelina Moy; 1211 S. Fern Street, Room C-109, Arlington, VA 22202-2808. Please cite DAR Care 91-312 in all correspondence related to this proposed rule.

FOR FURTHER INFORMATION CONTACT: Ms. Angelina Moy, telephone (703) 604–5386.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council

[FR Doc. 94-20969 Filed 8-24-94; 8:45 am]
BILLING CODE 5000-04-M

the assessments. Reclamation will take all necessary actions to prevent the delivery of irrigation water to ineligible land.

The Department of the Interior has determined that the proposed rule does not constitute a significant regulatory action under Executive Order 12866 because it will not: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition. jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order.

National Environmental Policy Act

Neither an environmental assessment nor an environmental impact statement is required for this rulemaking because, pursuant to 40 CFR 1508.4 and Departmental Manual part 516 DM 6. Appendix 9, § 9.4.A.1, this action is categorically excluded from the provisions of the National Environmental Policy Act.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget as is required by 44 U.S.C. 3501 et seq. and assigned clearance numbers 1006–0005 and 1006–0006.

Small Entity Flexibility Analysis

The proposed rule will not have a significant economic effect on a substantial number of small entities.

Civil Justice Reform

The Department of the Interior has certified to the Office of Management and Budget that this proposed rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778.

Authorship

This proposed rule was prepared by staff in the Reclamation Law Administration Branch, D-5640, Bureau of Reclamation, Denver, Colorado.

List of Subjects in 43 CFR Part 426

Administrative practice and procedure, Irrigation, Reclamation, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, it is proposed to amend 43 CFR Part 426 as follows:

Dated: May 16, 1994.

Elizabeth Ann Rieke,

Assistant Secretary—Water and Science.

PART 426—RULES AND REGULATIONS FOR PROJECTS GOVERNED BY FEDERAL RECLAMATION LAW

1. The authority citation for Part 426 is revised to read as follows:

Authority: 43 U.S.C. 371-383; 43 U.S.C. 390aa-390zz-1; 31 U.S.C. 9701.

2. Section 426.24 is redesignated as § 426.25, and new section 426.24 is added to read as follows:

§ 426.24 Assessments of administrative costs.

- (a) Forms submittal. A district will be assessed for the administrative costs described in paragraph (e) of this section when irrigation water has been delivered to landholders that did not submit certification or reporting forms prior to the receipt of irrigation water in accordance with § 426.10(e). The assessment will be applied on a yearly basis in each district for each direct and indirect landholder that received irrigation water but failed to comply with § 426.10(e).
- (b) Forms corrections. Where corrections are needed on certification or reporting forms, the requirements of § 426.10(a) will be deemed to have been met so long as the district provides corrected forms to the Bureau of Reclamation within 45 days of the date of the Bureau's written request for corrections. A district will be assessed for the administrative costs described in paragraph (e) of this section when corrected forms are not provided within this 45-day time period. The assessment will be applied on a yearly basis in each district for each direct and indirect landholder for whom corrected forms are not provided within the applicable 45-da♥ time period.

(c) Parties responsible for paying assessments. Districts shall be responsible for payment of the assessments described in paragraphs (a) and (b) of this section.

(d) Disposition of assessments. The administrative costs assessed and collected pursuant to paragraphs (a) and (b) of this section will be deposited to

the general fund of the United States Treasury as miscellaneous receipts.

(e) Assessment for administrative costs. The assessment for administrative costs shall initially be set at \$260. This is based on an average of the direct and indirect costs the Bureau of Reclamation incurs performing activities to obtain certification or reporting forms from landholders that failed to submit such forms prior to receipt of irrigation water and form corrections that are not submitted by the designated due date. This initial \$260 assessment for administrative costs will be reviewed at least once every 5 years and adjusted, if needed, to reflect new cost data based upon the Bureau's costs for communicating with district representatives and landholders to obtain missing or corrected forms: assisting landholders in completing certification or reporting forms for the period of time they were not in compliance with the form requirements: performing onsite visits to determine if irrigation water deliveries have been terminated to landholders that failed to submit the required forms; and performing other activities necessary to address form violations. Notice of the revised assessment for administrative costs will be published in the Federal Register in December of the year the data are reviewed.

[FR Doc. 94-15509 Filed 6-27-94; 8:45 am] BILLING CODE 4310-94-P

DEPARTMENT OF DEFENSE

48 CFR part 211, 227, and 252

Federal Acquisition Regulation Supplement; Rights in Technical Data

AGENCY: Department of Defense (DoD).
ACTION: Correction of proposed rule with request for comments.

SUMMARY: This action is to correct the address for submission of written comments for the proposed rule on Rights in Technical Data, which was published in the Federal Register on June 20, 1994 (59 FR 31584).

FOR FURTHER INFORMATION CONTACT: Ms. Angelena Moy, telephone (703) 604-5385/6.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulation Council.

Accordingly, the Department of Defense is correcting the proposed rule on Rights in Technical Data as follows:

On page 31584, column 3, the first sentence of the paragraph entitled ADDRESSES: is corrected to read:

"Interested parties should submit written comments to: Deputy Director Major Policy Initiatives, 1211 S. Fern St, Room C-109, Arlington, VA 22202-2808, ATTN: Ms. Angelena Moy, OUSDA (A&T)/DDP."

[FR Doc. 94-15647 Filed 6-27-94; 8:45 am]

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1831 and 1852

Revision to NASA FAR Supplement Coverage on Precontract Costs

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to amend the regulations pertaining to precontract costs to specify the content of letters to contractors which authorize the incurrence of precontract costs, make clear the circumstances when precontract costs would be appropriate, and clarify that precontract costs are not allowable unless the clause "Precontract Costs" is included in the contract. In addition, the proposed rule revises the prescription for the clause to allow its use in other than cost-reimbursement contracts. Also, the rule proposes to change the title of that clause from "Date of Incurrence of Costs" to "Precontract Costs" to more accurately reflect its purpose.

DATES: Comments must be received on or before August 29, 1994.

ADDRESSES: Submit comments to Mr. Joseph Le Cren, Contract Pricing and Finance Division (Code HC), Office of Procurement, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Le Cren, (202) 358-0444.

SUPPLEMENTARY INFORMATION:

Background

Although NASA has used authorization letters for precontract costs for many years, there has been little standardization in the contents of the letters. In addition, the current NASA FAR Supplement coverage at 1831.205-32 does not make it clear when the use of precontract costs would be appropriate, or that the clause at 1852.231-70 is required to be in the contract in order for precontract costs to be allowable. In addition, the clause prescription incorrectly states that the clause only should go in cost-

reimbursement contracts. The clause would also be applicable to fixed-price incentive or redeterminable contracts and to terminated firm-fixed price contracts, as the cost principles at (FAR) 48 CFR Subpart 31.2 would be applicable. The proposed rule specifies the information to be included in precontract cost authorization letters to contractors, identifies when the use of precontract costs would be appropriate, as well as requires the clause at 1852.231-70 be used for precontract costs to be allowable. The proposed rule also retitles the clause at 1852.231-70 from the "Date of Incurrence of Costs" to "Precontract Costs" to more accurately reflect the purpose of the

Impact

NASA certifies that this regulation will not have a significant economic impact on a substantial number of small entities under Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This rule does not impose any reporting or record keeping requirements subject to the Paperwork reduction Act.

List of Subjects in 48 CFR Parts 1831 and 1852

Government procurement.

Tom Luedtke,

Deputy Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1831 and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 1831 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1831—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Section 1831.205-32 is revised to read as follows:

1831.205-32 Precentract costs.

(a) The authorization of precontract costs is not encouraged and shall be granted only when there will be a sole source award or a single offeror has been selected for negotiations as the result of a competitive procurement, the criteria at (FAR) 48 CFR 31.295-32 are met, and a written request and justification has been submitted to and approved by the procurement officer. The justification shall (1) substantiate the necessity for the contractor to proceed prior to contract award, (2) specify the start date of such contractor effort, (3) identify the total estimated time of the advanced effort, and (4) specify the cost limitation.

(b) Authorization to the contractor to incur precontract costs shall be in writing and shall (1) specify the start date of incurrence of such costs, (2) specify a limitation on the total amount of precontract costs which may be incurred, (3) state that the costs are allowable only to the extent they would have been if incurred after the contract had been entered into, and (4) state that the Government is under no obligation to reimburse the contractor for any costs unless a contract is awarded.

(c) Precontract costs shall not be allowable unless the clause at 1852.231-70, Precontract Costs, is included in the contract

3. Section 1831.205-70 is revised to read as follows:

1831.205-70 Contract clause.

The contracting officer shall insert the clause at 1852.231-70, Precontract Costs, in contracts for which specific coverage of precontract costs is authorized under 1831.205-32.

4. Section 1852.231-70 is revised to read as follows:

1852.231-70 Precontract costs.

As prescribed in 1831.205-70, insert the following clause:

Precentract Cests

(XXX 19XX)

The contractor shall be entitled to reimbursement for costs incurred on or after in an amount not to exceed that, if incurred after this contract had been entered into, would have been reimbursable under this contract.

(End of clause)

[FR Doc. 94-15606 Piled 6-27-94; 8:45 am]

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Satety Administration

49 CFR Part 575

[Docket No. 91-68; Notice 93]

RIN 2127-AC64

Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Prevention

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT. ACTION: Notice of proposed rulemaking (Consumer Information Regulation); Termination of rulemaking (Federal Motor Vehicle Safety Standard).

SUMMARY: As part of its comprehensive efforts to address the problem of light vehicle reliever, this agency is

Listing of Public Commentors

- 1. AERO Gear Incorporated
- 2. American Bar Association
- 3. American Gear Manufacturers Association
- 4. Associated Aerospace Activities Incorporated
- 5. Bell Helicopter TEXTRON
- 6. British Defence Staff Washington
- 7. Business Software Alliance
- 8. COGR (Council on Governmental Relations)
- 9. Columbia Gear Corporation
- 10. DERCO Industries, Incorporated
- 11. DOW Corning
- 12. Dube', Barry
- 13. Electro-Methods, Incorporated
- 14. FMS Corporation
- 15. Grey Associates
- 16. HUGHES
- 17. IDCC (Integrated Dual-use Commercial Companies)
- 18. Independent Defense Contractor Association
- 19. Jo-Bar Manufacturing Corporation
- 20. Kaye, Scholer, Fierman, Hays & Handler
- 21. M/A COM, Incorporated
- 22. Management Consulting
- 23. Motorola

- 24. Multi-Industry Associations
- 25. Oja, Richard W.
- 26. Overton Gear and Tool Corporation
- 27. Pacific Sky Supply Incorporated
- 28. Precision Gear Incorporated
- 29. Process Gear
- 30. Proprietary Industries Association
- 31. Reliance Gear Corporation
- 32. Saxon Corporation
- 33. Seidman & Associates, P.C.
- 34. Shipbuilders Council of America
- 35. Sidley & Austin
- 36. Software Publishers Association
- 37. SPECO Corporation
- 38. SRI International
- 39. UNC (The Aviation Company)

Total number of Public Commentors = 39



1050 Day Hill Road, Windsor, Connecticut 06095 Tel. (203) 688-0888

August 1, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 S. Fern St.
Arlington, VA 22202-2808
Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR case 91-312

Dear Mr. Donatuti;

I am writing to you to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but for the past six years have utilized technical data provided by the government to produce quality spare parts for the government at competitive prices.

We at Aero Gear are concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in hope that Congress will fully review the impact of this change on competition and, ultimately, on American taxpayers.

We are particularly concerned about the following:

Changes in language making any data developed in the performance of a government contract proprietary, thereby resulting in less data available. We don't believe that data resulting from development of a defense end product should be the property of the OEM.

Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEM's will find this to offer a loophole. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

We are aware of contentions that these changes will apply only to future developments. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed - according to any formula - with any of our tax dollars. Approximately 10% of our sales volume relies upon available technical data. Though this is a small part of our business, it is important that we maintain or expand it.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. Finally, it will result in American jobs being sent offshore and higher costs that Secretary Perry is hoping to avoid.

Yours truly,

Roger Burdick

CC:

Senator Lieberman Senator Dodd Representative Kennelly



AMERICAN BAR ASSOCIATION

Section of Public Contract Law Writer's Address and Telephone



P.O. Box 786

Winchester, MA 01890-4286

Phone: 617-729-2219 617-721-0808 Fax:

August 18, 1994

1993-94 CHAIR Donald J. Kinlin 3rd Floor 2000 Courthouse Plaza, N.E. Dayton, OH 45402 513/443-6922

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Deputy Director Major Policy Initiatives SECTION DELEGATE Marshall I. Doke, Jr. 5700 Bank One Center 1717 Main Street Dallas, TX 75201 214/746-5701 Arlington, Virginia 22202-2808 Ms. Angelena Moy, OUSD (A&T)/DDP

> DAR Case 91-312, Defense Federal Acquisition Re: Regulation Supplement, Rights in Technical Data, 59 Federal Register 31, 584 (June 20, 1994)

Dear Ms. Moy:

This letter is written on behalf of the Section of Public Contract Law of the American Bar Association pursuant to special authority extended by the Association's Board of Governors for comments by the Lester Edelman 6330 Cavalier Corridor Falls Church, VA 22044 Section on acquisition regulations. The Section consists II, Area B, Room C7 of attorneys and associated professionals in private Wendy T. Kirby practice, industry and government service. The Section 8403 Colesville Road, Silver Spring, MD 20910 governing Council and substantive committees contain a practice, industry and government service. The Section's balance of members representing these three segments, to ensure that all points of view are considered. manner, the Section seeks to improve the process of public contracting for needed supplies, services and public The views expressed are those of the Section and have not been considered or adopted by the Association's Board of Governors or its House of Delegates and therefore, should not be construed as representing the policy of the American Bar Association.

On June 20, 1994, the Department of Defense ("DOD") issued a proposed rule and request for comments to revise policies and guidance contained in DFARS 227.4 (Rights in Data and Copyrights), the corresponding clause BOARD OF COVERNORS LIAISON (Rights in Data and Copyrights), the corresponding c David E. Cardwell in DFARS 252.227-7013, "Rights in Technical Data and Computer Software", and related sections and clauses. proposed rule reflects recommendations of the Government-Industry Technical Data Advisory Committee made pursuant to Section 807 of the Fiscal Year 1992/1993 National

Page 2

Defense Authorization Act. Section 807 required the Committee to make recommendations for final regulations to implement 10 U.S.C. § 2320, "Rights in Technical Data".

The Section's comments on several of the significant changes made in the proposed rule are set forth below. (References to the "Superseded regulation" refer to the existing technical data regulations contained in DFARS Subpart 227.4 and Part 252 that would be replaced by the proposed rule).

1. Elimination of "required for performance" criteria.

The proposed regulation addresses our earlier concerns and the Section supports the revision.

The proposed clause set forth at DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)", eliminates the "required for performance" criteria previously contained in DFARS 252.227-7013 "Rights in Technical Data and Computer Software (OCT. 1988)" subparagraphs (a)(11), (a)(12) and (a)(16). The "required for performance" criteria permitted DOD to obtain unlimited rights in technical data for items, components or processes developed at private expense, if development was "required for the performance of a government contract or subcontract." See DFARS 252.227-7013 "Rights in Technical Data and Computer Software (OCT. 1988)", subparagraphs (a)(11) and (b)(1)(i).

In earlier comments on the superseded technical data regulations, the Section noted that the "required for performance" standard overemphasized whether development was or was not required under a government contract. While ignoring the parties' respective level of funding and other factors, including prior contractor commitment or expertise in the development effort. The now-superseded language potentially impaired rights of contractors who developed such items concurrently at private expense. As noted in those earlier comments, the superseded regulation established a fairly arbitrary standard that was not capable of being flexibly and practicably applied.

2. Retention of "source of funds" basis for allocation of rights.

The provisions of the proposed rule contained in DFARS 227.403-4(b) and 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)" subparagraphs (a)(7)

Page 3

through (9), retain the "source of funds" criteria that required determination of the source of funding used to develop the items, component or process, and then uses that source of funds criteria as the basis for allocating rights between the government and the contractor.

In recommending this change, the Advisory Committee correctly noted that 10 U.S.C. § 2320 generally provides for the allocation of technical data rights based upon the source of the funds used to develop an item, component or process. The Section concurs that, to the extent that 10 U.S.C. § 2320 controls a particular contract, the "source of funds" basis is an equitable method to allocate rights to the Government and developers of technical data and/or computer software.

3. The definition of "developed".

The proposed rule set forth in DFARS 252.227-7013, "Rights in Technical Data-Noncommercial Items (XXX 1994)" subparagraph (a)(6), retains the essence of the preexisting definition of the term "developed" that the superseded regulations contained. See DFARS 252.227-7013 "Rights in Technical Data and Computer Software (OCT. 1988)" subparagraph (a)(10). The superseded regulations used two concepts to define "developed"; existence and workability, and the proposed regulation retains these concepts.

Under the proposed regulation, technical data exists if an item has been constructed or a process has been practiced. Workability requires sufficient analysis or testing to show that a process or item has a high likelihood of operating as intended. The Section comments that continuation of the "existence" and "workability" tests in the proposed clause is unduly stringent as a definitive test of "developed" in the context of technical data. Under modern "real world" conditions, an item or process reasonably can be considered developed even where such item or process has not been constructed or practiced. Development of aircraft using computer simulation and design is an example.

The Section recommends deleting the requirement that the item or process "exist," or at a minimum, adding language to the requirement that recognizes that computer simulation or modeling can substitute for a physical demonstration of "existence." An analogy would be the concept of "reduction to practice" in the patent area.

Clarification of "developed at private expense".

DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)" subparagraph (a)(7), as

Page 4

set forth in the proposed rule, provides clarification that items, components or processes developed with costs charged to indirect cost pools or with non-Government funds will be considered as developed at private expense.

The new rule makes explicitly clear that development accomplished with costs charged to indirect cost pools or costs not allocated to a government contract, or any combination thereof, shall be considered development at private expense. The Section considers that the proposed revision is consistent with the requirement of 10 U.S.C. § 2320 that implementing regulations define the treatment of items, components or processes developed utilizing funding from indirect costs pools. The Section further comments that the proposed revision provides equitable protection to data developer's internal background systems and engineering systems.

The Section supports adoption of the provision as proposed.

5. Creation of fixed "Government Purpose Rights".

DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)" subparagraph (b)(2), as contained in the proposed rule, establishes fixed Government Purpose Rights in technical data ("GPR"), where such data are developed with mixed Government and private funding. Under GPR, the Government obtains a five year (or other negotiated) license to use the data for government purposes, including competition, but which provides protection to the developer's exclusive right to commercialize the data during the period of the GPR license. At the end of the fixed five year or other negotiated period, the Government receives unlimited rights.

The superseded technical data rights regulation provided the Government with unlimited rights in technical data developed with mixed private and governmental funding <u>unless</u> the developer requested the exclusive right to commercialize and a mutually acceptable license could be negotiated. The superseded regulations did not permit such license negotiations where the Government anticipated that the data would be needed for reprocurement.

The proposed regulation grants the Government a license to use the data for governmental purposes (including competition), but simultaneously protects a developer's exclusive right to commercialize the data for five years from the date of the contract, or other negotiated period.

Page 5

The Section considers that the proposed revision is an improvement to the previously existing regulation, but observes that automatic translation into unlimited rights for the Government upon expiration of the fixed period (thereby making the formerly GPR data available on a worldwide basis) may be The Section recommends that the minimum fixed period be enlarged (beyond five years) or that the five year period spring from the date of final payment rather than the award date of the contract or subcontract. Development contracts may span several years, and the data developed under such mixed funding contracts may not be "developed" as defined in the regulations until near the end of contract performance. Under such circumstances, the date of final payment would be a more equitable basis from which to initiate Government Purpose It would minimize the need to negotiate a separate Rights. period.

Alternatively, the GPR period should be made indefinite to encourage domestic commercialization and to provide support for U.S. Industry. To further support U.S. Industry the definition at DFARS 52.227-7013(a)(11) should exclude disclosure of GPR data outside the United States except for evaluation and informational purposes only.

6. Separate coverage for computer software.

The Section recommends adoption of the framework as proposed.

DFARS Subpart 227.5 "Rights in Computer Software and Computer Software Documentation", as added in the proposed regulation, creates new separate coverage for computer software. A new clause, DFARS 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation (XXX 1994)", is also added.

Although the proposed separate treatment for computer software costs adds additional clauses and regulatory coverage to the DFARS, the Section concurs with the Advisory Committee's rationale that separate regulatory treatment for computer software provides greater flexibility to deal with future statutory or technological developments. The Section believes that a separate clause and regulation for computer software is practical and beneficial.

7. Private expense determinations.

Proposed DFARS 227.403-4(b) and 252.227-7013, "Rights in Technical Data-Noncommercial Items (XXX 1994)" subparagraph (a)(7)(i), provide that determinations of whether data were developed at private expense are to be made at the lowest

Page 6

practicable level. The proposed regulation notes that the determination of the source of development funds should be made at any practical sub-item or sub-component level or for any segregable portion of a process. DFARS 227.403-4(b).

The Section views the proposed revision as promoting more effective and appropriate private expense determinations and supports adoption of this provision as proposed.

8. General comments.

Some Section members, generally representing technical data developers, still consider that there are problems with DOD's data rights policy. Conversely, at the other end of the spectrum, one commenting Section member (representing primarily data replicators and users) considers that the proposed rule unduly favors data developers. The Section consensus is that the revisions contained in the proposed regulation represent an improvement to DOD's existing technical data and computer software provisions, strike a difficult balance between private and governmental interests in this area, and better support long-term private sector investment in technology development for DOD and commercial purposes compared to the existing regulations.

CONCLUSION

The Section respectfully requests that these comments be considered in the issuance of a final rule. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as may be required.

Sincerely,

John B. Miller, Chair

Section of Public Contract Law

cc: Frank H. Menaker, Jr.

James F. Hinchman

Laurence Schor

Marshall J. Doke, Jr. Karen Hastie Williams

Donald J. Kinlin

Council Members

Chair and Vice Chairs

Patent and Data Rights Committee

Laura K. Kennedy Richard C. Loeb

JOE T. FRANKLIN JR., CAE EXECUTIVE DIRECTOR

August 15, 1994

Deputy Director for Major Policy Initiatives 1200 S. Fern Street Arlington, VA 22202-2808 Attn: Ms. Angelena Moy, OUSD (A&T)/DDT

Reference: DoD Proposed Rules, DAR Case 91-312

The American Gear Manufacturers Association represents companies manufacturing gears and gearing products in the United States. Our membership is 95% small businesses. As a point of reference, no movement of DoD weapon systems would be possible without gearing. As a result, gears have been determined to be critical components in several U.S. government studies¹ as well as the Defense Production Act.

Given that context, there is absolutely no possibility that AGMA can support the recommended changes in DAR Case 91-312. It is clear to those who understand the spare parts procurement processes and the defense realignment strategies of the Original Equipment Manufacturers (OEMs) that these changes will significantly enhance the OEM control of the defense aftermarket while easily excluding competition, generally provided by small businesses. In the case of gearing, these changes will enhance the ability of the OEMs to channel more subcontracting opportunities to foreign partners. Gears are not products on which the United States should be foreign-dependent.

¹National Security Assessment of the U.S. Gear Industry, U.S. Department of Commerce, Bureau of Export Administration, Office of Industrial Resource Administration, January, 1991.

The Effect of Imports of Gears and Gearing Products on the National Security," U.S. Department of Commerce, Bureau of Export Administration, Office of Industrial Resource Administration, Strategic Analysis Division, July, 1992.

Loss of "in Performance of a Government Contract" Language

We are concerned about many of the changes. One is the method of determining access to data. Under DFARS 227.402-72(a), "Rights in Technical Data--Unlimited Rights," the Department of Defense is entitled to unlimited rights in data which are required for the performance of a Government contract or pertaining to items, components, or processes developed exclusively at Government expense. As a result, these rights exist in the public domain and can be utilized to bid for DoD, commercial and foreign sales. A primary concern is the recommendation found in DFARS 252.227-7013, "Rights in Technical Data-Noncommercial Items." Under this proposed rule, DoD would still have unlimited rights in data developed entirely at Government expense, but no longer to all data developed in performance of a government contract.

The Definition of "Private" Expenses/Mixed Funding

Perhaps even more dangerous is the <u>way</u> data rights will be determined based upon the method of funding--public or private expense. The potential for serious abuse exists in the recommended definition of "private expense." Under the committee's recommended regulation and clause, indirect costs charged to a government contract and paid for by taxpayers would be treated as a private expense (DFARS 252.227-7013(a)(7),(9). And when an item, component or process is paid for entirely at private expense, the Government would only have limited rights (DFARS 227.403-5(c). These limited rights could not be used for competitive purposes since the data could not be disclosed or released outside the Government (DFARS 252.227-7013(a)(13).

Another disturbing recommendation surrounds the use of mixed funded data. Even if only a portion of the development cost is claimed to have been at private expense, the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (DFARS 227.403-5(b). This is a stark contrast to the existing regulations, which allow unlimited rights unless otherwise negotiated. Under the proposed regulations, the OEM would be able to limit the Government to GPR by paying for, or charging indirectly, some possibly insignificant portion of development while the taxpayer funds the rest. In that case, competitors could not use the data--developed largely at public expense--to compete for commercial and foreign sales during the five-year period. There is no mechanism established in the recommendations to ensure potential competitors timely access to GPR data for DoD procurement during the period. Alternate sources need access to pertinent technical data before a solicitation is issued to obtain necessary source approvals and to submit timely responses. Under current regulations, alternate sources use FOIA and agency cash sales programs to obtain such data, but since GPR would be proprietary to the OEM that data could be with held under FOIA Exemption 4 governing confidential business information and not releasable under cash sales programs.

Current accounting practices allow OEMs to charge significant design and development costs to indirect accounts. AGMA monitored the committee meetings and heard the OEM representatives argue passionately that indirect costs, particularly manufacturing production and engineering (MP&E) be considered private expense. (They even pressured Chairman

Eleanor Spector on this point until she conceded to their wishes and included mp&e in the definition.) OEMs commonly charge the development of mp&e specifications essential to competition as indirect mp&e under FAR 31.205-25. Examples of manufacturing processes used to produce critical gearing include non destructive inspection and heat treating. It is often impossible to obtain source approval without the OEM manufacturing processes and the right to use them.

The result is that the only data available to our members will be that portion funded 100% by the Government as a direct cost. Therefore, data developed and funded by our members' taxes will be unavailable to them.

The Result

We are certain that our members will be jeopardized by the changes. We are already facing a job loss to foreign countries because OEMs look for every opportunity to feed offset agreements and foreign partnerships. These changes will give them one more opportunity to export our jobs and our critical capabilities, and the result will be increased foreign dependence for gearing.

AGMA attended the last 18 months of the Section 807 committee deliberations. We were disappointed at the way the OEMs, representing themselves as "industry" dictated policy and tried to control the outcome of discussions. Their tactics included refusing to allow us to attend an "industry" meeting when we were invited by Eleanor Spector as well as unpublicized meetings with high level DoD officials. The 807 product clearly demonstrates their success: alternate sources to the OEMs will be greatly constrained and DoD will return to the high OEM price scandals of the early 1980's. It is unbelievable to us, that in this period of downsizing the defense budget, DoD would allow the OEMs to engineer these changes giving them exclusive use of data that might otherwise help to control costs and maintain American jobs and capabilities.

The Section 807 Committee Chairman Eleanor Spector has noted several times that less data will result in less competition. Less competition will have a direct impact upon small business opportunities, and we don't believe that the affected small business community is even vaguely aware of the changes contemplated by DoD. We strongly urge DoD to suspend the implementation of the final rule until the appropriate Congressional committees, and the affected small businesses, can be made aware of the significance of these changes.

Sincerely

Joe T. Franklin



August 5, 1994

Deputy Director Major Policy Initiatives 1200 S. Fern Street Arlington, VA 22202-2808

Attention: Ms. Angelena Moy/OUSD(A&T)/DDP

Subject: Technical Data Restrictions on Small Business (DAR Case 91-312)

Dear Ms. Moy:

- 1. We have been advised your office is the contact point for expressing our objection to proposals for specific rights to technical data recommended by Section 800 and 807 panels.
- 2. It is our understanding several recommendations have been made that directly concern us (as well as other small businesses) who work directly with Air Force, Navy, and Defense Logistics Agency in the procurement of spare parts. This is based on the proposals on technical data outlined in the Federal Register of June 20, 1994.
- 3. It should be noted that the Section 800 and 807 panels were dominated by large business and OEM interests, and Small Business was only minimally represented. For this reason, we do not feel decisions reached were balanced and equitable with the interests of Small Business.

More specifically, we find the following suggested changes unacceptable as not in our best interests as an operating Small Business organization.

- A. Any proposed policy changes that would restrict the right of small businesses to obtain and use technical data developed under Government contract for purposes of competing for DOD requirements.
- B. Elimination of the "Required For Performance Criterion", under which the DOD gives up the basic policy of obtaining unlimited rights to technical data even if development is "required for the performance of a government contract or subcontract".
- C. Modification of the existing regulations that require indirect costs of development to be considered government funded, and replacement with modified regulations which provide that indirect costs to be development accomplished at private expense.
- 4. By placing the above recommendations into practice, those small businesses who provide support directly to the DOD will be severely impacted or decimated. Further, it will force "sole-sourcing" to OEM's and

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Deputy Director Major Policy Initiatives Page 2 August 4, 1994

revert spare parts procurement procedures back to the failures and cost abuses of the past. A direct result of "sole-sourcing" forced Congress to eliminate past excessive costs and procurement scandals by legislating the Competition In Contracting Act (CICA) and establishing "Competitive Advocates" into procurement activities in order to allow Small Business an inroad and to expand competition.

For your information, noted below is a section from a Report to Congress by the Office of Federal Procurement Policy entitled "Review of the Spare Parts Procurement Practices of the Department of Defense" issued during that time period.

"Responding to a request from Congress, the General Accounting Office (GAO) conducted an in-depth review of the effectiveness of the program and the accuracy of reported accomplishments. The GAO noted in its report dated August 2, 1982, that <u>technical data is critical to the breakout process</u>. The GAO concluded that SBA's efforts resulted in large dollar savings in relation to the program's costs." (underlining is ours)

"To date, approximately 2,329 items have been successfully "broken-out" for competition at the four ALC's. Documented savings are \$43.8 million."

5. We are finding the "Competitive Advocate" program set up by Congress to accelerate and manage the "break-out" program has already been emasculated in Air Force procurement programs. To now remove the ability to obtain the technical data and drawings will effectively close down small business as competition to the OEM's, deny the government the typical cost savings noted above, and retrogress procurement to the higher costs and abuses of the past. We urge you to take such actions available to you to eliminate proposals to change the data rights policies.

Sincerely,

ASSOCIATED AEROSPACE ACTIVITIES, INC.

D. E. Johnson President

cc: File

Bell Helicopter TEXTRON

Bell Helicopter Textron Inc. A Subsidiary of Textron Inc.

Jack A. Stein
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August 16, 1994

Deputy Director Major Policy Initiatives 1211 S. Fern Street Room C-109 Arlington, VA 22202-2808

Attn: Ms. Angelena Moy, OUSDA (A&T)/DDP

Subject:

Proposed DoD Rule on Rights in Technical Data published

in the Federal Register on June 20, 1994

Dear Ms. Moy:

Overall I compliment DoD on the direction it is moving. However, there are still a few changes which need to be made to fulfill Congress's charter given to the Section 807 Committee. To that end, I have enclosed some comments to the proposed rule which I hope you will find helpful.

Thank you for the opportunity to comment. If you have any questions or desire to discuss the enclosed comments, please call the undersigned at (817) 280-2252.

Sincerely,

Jack A. Stein, Chief Attorney

Government Contracting, Procurement,

and Intellectual Property

Encl.

In Reply Refer to: 09:JAS:mh-1093

Comments on Proposed DoD Rule on Rights in Technical Data

227.403-5 Government rights

- a. This section provides a series of paragraphs stating under what circumstances the Government acquires "unlimited" rights. Although (a)(1) now reflects the deletion of "required for the performance of a government contract or subcontract" and ties the issue to funding, many of the remaining paragraphs, such as (a)(2), (a)(4) and (a)(5), are open ended and do not state that the work must be exclusively funded with direct Government contract funds. We suggest that the introduction to "unlimited" rights state unequivocally that the "exclusive funding" determination be a foundational step in this process. Otherwise, one could argue that the Government obtains "unlimited" rights in any form, fit or function data [see (a)(4)] or in data related to an element of performance [see (a)(2)], regardless of whether the Government exclusively funds the effort.
- b. This section also addresses Government purpose rights, i.e. data developed with mixed funding. However, there has been no attempt to address the mixture of funding as was the case in some earlier drafts. It now appears that the Government need only fund a small percentage of the work to obtain Government purpose rights. Upon the expiration of the five year or other negotiated period, the Government would then obtain "unlimited" rights. Although we recognize that it is difficult to establish the required mix of Government and contractor funding for Government purpose rights, it seems inequitable that the Government could eventually obtain "unlimited" rights based on minimal Government funding. This appears to create a disincentive for those companies which have substantial commercial business or otherwise desire to continue to do Government business while at the same time aggressively pursuing "Defense Conversion initiatives." Companies would be more inclined to participate in mixed funding efforts if the Government was required to contribute substantial funding, for example, at least 50% of the effort. If the Government has Government purpose rights, it can certainly accomplish its charter and acquire those goods and services needed to conduct the Government's business. Therefore, we propose that either a substantial percentage of required Government funding be included or, in the alternative, that the automatic conversion to "unlimited" rights revision be deleted and that the data remain "Government purpose rights" indefinitely. In addition, the Government may want to consider providing the contractor with an option to extend the Government purpose rights period for an additional five years or otherwise allow the contractor the option to reimburse the Government at the end of the initial five year or negotiated/extended period for the Government's share of its funding and thereby exclude release of the data for commercial purposes.
- c. With respect to "Government purpose rights," we also recommend that "Government purpose" be expressly restricted to the U.S. Government for the procurement of goods and services under a U.S. Government contract and that use of the data by a "foreign government" be classified as a "commercial purpose."
- d. We also recommend that (b)(2) be revised to make it clear that the Contracting Officer "should freely grant" longer Government purpose rights periods based on the contractor's representation that the longer period is needed in order for the contractor to maximize recovery of its investment in the commercial arena. Unless such a statement is made, Contracting Officers will be hesitant to negotiate longer periods or will require a level of substantiation which is unreasonable given the uncertainties of future business events.

e. We have a problem with (b)(3) which provides that the Government purpose rights period commences upon execution of the contract, subcontract, letter contract, etc. Since the Government obtains "unlimited" rights upon the expiration of this period, it is important to remember the intent of Government purpose rights in the first place. If a contractor invests substantial funds in a mixed funding situation, it wants to be assured that application of the data in the commercial arena is viable for a reasonable period of time in order to recapture its investment. Under the current language, this period may have run or otherwise been substantially reduced before the contractor has the opportunity to make an impact in the commercial sector. Therefore, we recommend that this provision provide that the Government purpose rights period only commence upon delivery to the Government of the data.

2. 252.227-7013 Rights in technical data - Noncommercial items

- a. Paragraph (a)(7) defines "Development exclusively at private expense" to include "...costs not allocated to a government contract..." This phrase is confusing and somewhat inconsistent with the phrase "costs charged to indirect cost pools." We recommend that this phrase be deleted and that the following be substituted: "costs not charged directly to a government contract."
- b. The definition of "Developed with mixed funding" would also have to be changed to reflect the comment in paragraph 2.a. above.
- c. This clause should be further revised based upon the comments provided in paragraph 1. above.
- d. Paragraph (e)(2), Identification and delivery of data to be furnished with restrictions on use, release, or disclosure, states, in pertinent part, that "...The contractor shall not deliver any data with restrictive markings unless the data are listed on the Attachment." Although paragraph (e)(3) allows additional assertions to be added "after award when based on new information or inadvertent omissions," this provision could be interpreted as a de facto "list or lose." In addition, we can see where factual disputes could arise over the implementation of the phrases "new information" and "inadvertent omissions." In order to clarify this provision, we recommend that the provision be revised to make it clear that a failure to list the data for any reason, excusable or otherwise, does not prevent a contractor from asserting its rights. It should be further stated that a failure to agree will be considered a "dispute" under the contract to be resolved pursuant to 252.227-7037. The Contracting Officer should be required to accept the additions to the Attachment until the Government has successfully challenged the contractor's assertions pursuant to the above provision.



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BFP02

Letters from UK

British Embassy

should be addressed

Mrs Eleanor Spector

OSD(USD)(A) Room 3E 144

The Pentagon Washington DC 20301 Your reference

Our Reference

Pats/L/93/01

Date

25 July 1994

I said I would send you a note on the proposed new DFARS provisions covering data rights prior to our meeting on 4 August.

I have annexed to the present letter a note detailing our concerns. In brief they are as follows:

Internationally Collaborative Programmes. 1.

- There is no instruction to Contracting Officers to use the Govt-to-Govt Programme MoU as the basis of the contract where the work supports an internationally collaborative programme.
- It is also questionable as to whether the current draft is sufficiently flexible to allow departure from the standard rights to allow sharing of technology with the partner Governments.

Government Purpose Rights. 2.

- Does the definition of GPR allow for exchanges of information between a foreign Government and its contractor?
- 'Defense Purpose' rights of use in MoU's require special consideration if Security Assistance is to be covered.
- MoU and existing treaty provisions pre-empt the need for UK Government signature of a Use and Non-disclosure Agreement.





d. A requirement for the UKG to sign a legally binding agreement causes problems (see the history of the 'Chapeau' Agreement').

3. Discrimination Against Foreign Contractors.

Countries such as the UK who have a bilateral co-operation MoU with the US would expect exemption from 252.227-7032 (comparable to Canada).

4. CALS Requirements.

We are interested in your vision of how 227.408(c) and (d) would operate with a CALS Integrated Weapon System Data Base (IWSDB).

I look forward to meeting you on 4 August. I am copying this note to Mike Cifrino and Vince Knox as they are involved in the issues and have indicated that they will be present at the meeting.

Regards

(Miss Freda Sedgwick)

Copy:

Mr M Cifrino Mr V Knox



1. Internationally Collaborative Programmes.

- (a) When we enter into internationally collaborative programmes which are supported by contractors we, of course, have to accept that our standard domestic contracting practices will not necessarily suit the requirements of the programme. For this reason we must set out in the Government-to-Government MoU the areas where we need to modify or compromise on our normal procedures. Past practice tells us that the Intellectual Property Rights provisions in MoU's are often one of the most difficult areas and require the hardest compromises. It is therefore essential to keep domestic practices flexible to accommodate the compromises which are agreed in the MoU.
- (b) In the UK it is understood that the MoU will be the master document which drives the programme and that implementing contracts must comply with the MoU. Contracting officers must therefore look to the MoU first in determining appropriate contract conditions and must depart from standard national conditions where needed. In the simplest case (eg a 50/50 joint USG/UKG development contract) it may be sufficient to use standard conditions and arrange for both the USG and the UKG to be equal recipients of rights. In less simple cases a wholly different structure may be required. In nearly all cases the UKG's contractor will be required to provide more rights under the contract than would be required under a standard domestic contract as a natural consequence of the requirement to provide rights to the USG.
- (c) Although the proposed new DFARS suggests at paras 227.403-5 and 227.503-5 that approaches other than the standard approach may be used, there are three problems.
 - (i) no language is included to alert the Contracting Officer to the need to provide for rights to other Governments and their representatives when contracting under internationally collaborative programmes.
 - (ii) nothing is said about the need to construct the contract in accordance with the MoU,

(iii) the DFARS indicates that rights broader than those specified in the standard conditions cannot be secured from Industry if there is to be any departure from standard conditions. Clearly this could lead to problems, particularly if Restricted, or Limited Rights information is involved and there is a requirement to pass this information to another Government or its contractors for use in the programme.

2. Government Purpose Rights (GPR).

a. <u>Definition of GPR</u>.

- (i) In some instances where our Governments decide to collaborate on a programme, national work has already begun and contracts have already been placed. We must then rely on the flexibility built into our standard conditions in order to share the results.
- (ii) In the past the US has been able to rely to a large extent on Unlimited Rights to support these kinds of programmes. In the future GPR will be more prevalent and it was for this reason that I first raised with the 807 Committee the issue of how broadly the GPR right was to be defined. It was then defined to include internationally collaborative programmes.
- (iii) We assume that the present definition allows not only passage of GPR data to a foreign Government, but also allows onward passage to that Government's contractors. We would welcome your confirmation of this.
- (v) We also assume that GPR data would not be available to the foreign Government for 'Defense Purposes' where those purposes include Security Assistance. If the MoU for the collaboration requires this right to be available to the foreign Government, the USG's contract would therefore present a problem. This is important since some MoU's require 'Foreground Information' to be available to the Participants for 'Defense Purposes'. Contracting Officers who are

procuring in support of these programmes will therefore need to be alerted to the potential difficulties.

(b) <u>Use and Non-Disclosure Agreement.</u>

- (i) We note with some concern that there is a requirement for foreign Governments receiving GPR information to sign a Use and Nondisclosure Agreement. The mechanism which is currently used to constrain a foreign Government's use of information is the project MoU. This usually contains detailed provisions concerning use and disclosure rights in a contractor's information and is backed up by a number of general arrangements. These include two treaties (the NATO Agreement on the Communication of Technical Information for Defence Purposes, the UK/US Agreement Concerning Defence Cooperation Agreements [the 'Chapeau Agreement']) and an MoU (the December 1985 US/UK Co-operation MoU). In our view there is no need for a further undertaking such as that given in proposed DFARS para 227.403-7.
- (ii) If undertakings such as those in para 227.403-7 were to be required within an international exchange, we would expect them to be given reciprocally. The USG would therefore be expected to adhere to the same restrictions.
- (iii) The Agreement at para 227.403-7 provides an additional problem for the UKG as it appears to require a legally binding agreement from the signing Government. We have already indicated to DoD that this causes us a problem and we have been through a prolonged period of difficult debate on the issue. After 18 months of delayed international programmes we finally resolved this by signing the 'Chapeau' Agreement in 1993. We would not wish to re-open this debate now.

3. <u>Discrimination Against Foreign Contractors</u>.

We note from paras 227.403-17 and 227.503-17 of the proposed new DFARS that DoD intends to retain clause 252.227-7032.

However, there is no indication that it does not apply to countries with whom the US has a co-operation MoU such as the December 1985 UK/US MoU. We assume that, as we have agreed not to discriminate against each other's contractors, clause 252.227-7032 would not be used for UK contractors. We would suggest that some clarifying text should be included to indicate that, in addition to its not applying to Canada, the clause also does not apply to other MoU countries.

4. CALS Requirements.

We note with interest the provisions of para 227.408(c) and (d). We are currently considering the implications of standard IPR contract clauses for the CALS concept of an Integrated Weapon System Data Base (IWSDB). It would seem from 227.408(c) and (d) that a sub-contractor who has Limited Rights data may be able to avoid contributing that data to a IWSDB maintained by his prime contractor if he so wishes. We would be interested in any thoughts you may have on this point and whether any consideration has been given to it in the light of the CALS philosophy.



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August 19, 1994

Deputy Director Major Policy Initiatives 1211 S. Fern Street Room C-109 Arlington, Virginia 22202-2808

Attention:

Ms. Angelena Moy

OUSDA (A&T)/DDP

Re:

DAR Case 91-312

Dear Ms. Moy:

The Business Software Alliance (BSA) is pleased to have the opportunity to provide written comments on the Department of Defense's (DOD) proposed rule on Rights in Technical Data as published in the Federal Register on June 20, 1994. 59 Fed. Reg. 31584. The Business Software Alliance represents the major software publishers including Apple Computer Inc., Aldus Computer, Inc., Autodesk Inc., Claris, Inc. Intergraph Corp., Lotus Development Corporation, Microsoft Corporation, Novell, Inc., and Santa Cruz Operations. The three components of the "core" software industry. customer computer programming services, prepackaged software, and computer integrated design, in aggregate, now account for \$36.7 billion in value added to the U.S. economy. For the entire period 1982 to 1992, the software industry grew by 269 percent in real terms, while the remainder of the economy grew by about 30 percent.

Even though the federal government represents a small percentage of total sales for BSA members, our companies view their federal customers as an important part of their overall sales effort. For that reason, BSA applauds DOD's efforts to update and clarify current technical data regulations with regard to rights in commercial computer software and commercial computer software documentation in order to make them more consistent with the practices in the commercial marketplace. By eliminating existing impediments, DOD not only benefits BSA member companies by reducing some of the extra costs associated with doing business with the Government, but will also increase the level of competition for the Government's business with a reduction in prices being the anticipated result.

Summary

BSA is generally pleased with the clear intent of the proposed regulations. Proposed new Subpart 227.5, Rights in Computer Software and Computer Software Documentation, and in particular, section 227.502, Commercial computer software and commercial computer software documentation, evidence the recommendations of the Government-Industry Technical Data Advisory Committee. In particular, BSA strongly supports the concept of having the Government rely on the protections available in the commercial marketplace to protect the Government's interests when purchasing commercial computer software and documentation.

At the same time however, BSA strongly recommends that existing ambiguities in the proposed regulations be eliminated so that the intent of the regulations is reflected in the actual language. Principally, this involves modifying the regulations to reflect that whenever DOD purchases commercial computer software and documentation that was developed without any government funding, DOD shall acquire that software and documentation pursuant to the terms of the existing commercial licenses except in exceptional and rare circumstances. Without these recommended changes, DOD contracting officials, when following the exact requirements of the regulations as currently drafted, will once again impose unnecessary and burdensome requirements on commercial software manufacturers contrary to the intent of the regulations. It is absolutely critical that the current ambiguities in the proposed regulations be eliminated so that there is no doubt that when purchasing commercial software and commercial software documentation, DOD contracting officials will rely solely on existing commercial licenses.

Detailed Comments

For ease of reference, BSA offers the following detailed comments in numerical order of the proposed regulations.

227.500(b)

This section states that Subpart 227.5, Rights in computer software or computer software documentation:

[d]oes not apply to computer software or computer software documentation acquired under GSA schedule contracts.

Comment

DOD represents a major source of purchases of commercial computer software and documentation via GSA schedules. By exempting those purchases from the DOD regulations, the proposed regulations perpetuate a dual system of coverage for computer software and documentation purchased by DOD that is inconsistent with statutory requirements. That system, as it currently exists, results in DOD offices buying software pursuant to the civilian agency technical data clause rather than the DOD clause.

GSA could and should easily amend its schedule solicitation for software by adding a clause that states that for purchases by DOD of commercial software and documentation, the DOD rules shall apply. Because the clear intent of those rules for commercial software and documentation is to use commercial licenses, no additional paperwork would be necessary or duplicated and DOD users of popular commercial products that are purchased by virtually every DOD buying office would need to follow only a single set of regulations.

Recommendation

Delete "[d]oes not apply" from the first line and replace it with the word "[a]pplies."

227.501(b)

This Section provides that relevant terms used in the Subpart, 227.5, Rights in computer software or computer software documentation, are defined in the clause at 252.227-7014, Rights in Computer Software and Computer Software Documentation. That clause provides the following definitions of particular importance to members of BSA:

- (1) Commercial computer software means software developed or regularly used for non-governmental purposes which --
 - (i) Has been sold, leased, or licensed to the public;
 - (ii) Has been offered for sale, lease, or license to the public;
 - (iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or,

- (iv) Satisfies a criterion expressed in (a)(1) (i), (ii), or (iii) and would require only minor modification to meet the requirements of this contract.
- (4) Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.
- (5) Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Comment

The proposed definition of commercial computer software is so broad that it includes computer software that was developed, at least in part, with government funds as well as truly commercial software that was developed without any government funds. With very few exceptions, the vast majority of what the commercial marketplace would define as commercial computer software is developed exclusively at private expense.¹

Furthermore, the proposed definition, by requiring that commercial computer software be "developed or regularly used for non-governmental purposes" ignores the fact that commercial software manufacturers view the government marketplace in the same way as they view other commercial industries. As a result, in an effort to remain competitive and be responsive to the peculiar needs of a particular industry or marketplace, software manufacturers will develop, at their own expense and without any government funding, specialized software that meets the needs of a particular set of users. The resulting software is commercial because it was developed without government funding, but it may or may not be sold to commercial customers that do not

¹ BSA has been unable to identify a single product manufactured by its members and sold to commercial customers that was developed, even in part, with any government funding.

have the same need of government users.² Under the proposed regulations however, that software would not qualify as commercial computer software.

In addition, the proposed regulations are based, in part, on the basic premise that the Government deserves greater rights in computer software that was developed, at least partially, with government funds. As currently drafted, however, the proposed definition for commercial computer software includes computer software developed at least partially with government funds. That result is inconsistent with the proposed policy that "[c]ommercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public. . . ." 227.502-1(a).

The proposed regulations also create the situation where Clause 252.227-7014 is inserted in a solicitation which requires the delivery of both truly commercial as well as noncommercial software.³ That clause creates a number of requirements, including marking, verification, and audit requirements that increases significantly the costs and risks of doing business with the Government for commercial software manufacturers without providing any real benefits to the Government when buying commercial software that was developed without government funds and in which the government does not have any particular special interests.

In order to ensure that commercial software manufacturers are not burdened by the increased requirements, while still ensuring that the Government receives appropriate rights when it has participated in funding the development of software, the proposed definition for commercial computer software should be changed so that only software developed without government funding is included. Furthermore, the test for defining commercial computer software with regard to the rights obtained by DOD should be based on the source of funding for software development and not the particular marketplace for which the software was developed.

A good example of this type of development is the recent court decision mandating that e-mail documents be retained as agency records. Software manufacturers, recognizing both the need for specialized e-mail features created by the court rulings and the size of the actual market for such software may develop, at their own expense, specialized e-mail software for government use. It is unlikely, however, that the software will ever be "regularly used for non-governmental purposes" because few if any private sector industries have a similar, court enforced requirement.

³ Paragraph 227.503-6(a)(1) states that the clause 252.227-7014 is not to be used "when the *only* deliverable items are . . . commercial computer software of [sic] commercial computer software documentation." Emphasis added.

In addition, in order to make the proposed regulations consistent, the term commercial computer software documentation should be defined in a similar manner as commercial computer software. It will do a commercial computer software manufacturer little good if it is able to eliminate the unnecessary costs associated with providing commercial software to the Government to then turn around and have them imposed on the commercial software documentation that is sold with the software.

Recommendation

Eliminate the phrase "developed or regularly used for non-governmental purposes" from the definition of commercial computer software.

Add the following paragraph to the definition of commercial computer software:

; and (v) was developed exclusively at private expense.

Add the following paragraph at 242.227-7014:

- (1) Commercial computer software documentation means software documentation developed or regularly used for non-governmental purposes which --
 - (i) Has been sold to the public;
 - (ii) Has been offered for sale to the public;
 - (iii) Has not been offered or sold to the public but will be available for commercial sale in time to satisfy the delivery requirements of this contract; or,
 - (iv) Satisfies a criterion expressed in (a)(1) (i), (ii), or (iii) and would require only minor modification to meet the requirements of this contract; and (v) was developed exclusively at private expense.

227.502-1(c)(1)

This subparagraph provides that offerors and contractors shall not be required to:

Furnish technical information related to commercial computer software or commercial computer software documentation that is not

customarily provided to the public except for information documenting the specific modifications made to such software or documentation to meet the requirements of a DOD solicitation;

Emphasis added.

Comment

The term "technical information" is an undefined term in the proposed regulations as well as the entire FAR that is only used in one other place in the proposed regulation. See 227.402-1(b)(1). It is unclear why this subparagraph uses this term or what the term means.

Furthermore, this subparagraph, as presently drafted, will create the unacceptable situation whereby a commercial software manufacturer will be required to provide DOD with technical data for which DOD did not fund the development. This would occur when a commercial software manufacturer responds to a particular government marketplace need by modifying or developing, at its own expense, software that will satisfy a particular government need. When that need is inserted into a solicitation, this subparagraph would require the manufacturer to provide DOD with the technical data supporting any such modification. This should occur only when DOD has specifically funded the modification work.

Recommendation

Substitute the term "technical information" with the term "technical data."

Insert the words "at DOD's expense" after the phrase "documenting the specific modifications made to such software".

227.502-3(b)

This subparagraph provides that the Government is to negotiate for any additional rights not conveyed under the software license provided to the public. The subparagraph states:

If the Government has a need for rights not conveyed under the license customarily provided to the public, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

Comment

The need for the Government to obtain from commercial software manufacturers rights beyond those customarily available in the commercial marketplace should be extremely rare and limited. Because of the significant additional costs and potential difficulties associated with such negotiations,⁴ the Government contracting officer should be required to justify in writing the need for the additional rights and obtain approval for seeking the additional rights from at least one level above the contracting officer. This is particularly true for those DOD offices that have been requiring the use of escrow agreements for source code for widely available commercial software programs. Those additional requirements only add to the cost of doing business with the government without adding any real value to the process.

Furthermore, the concept of "negotiation" addressed in this subparagraph implies that the additional rights will be discussed after and not before contract award. The need for additional rights should clearly be known to the Government prior to submission of offers as a result of the market research and analysis performed by government officials as required by FAR 7.105, 10.002(a)(2), and 11.004. As a result, except in the rarest of cases, the need for additional rights will be known at the time the solicitation is being prepared and potential officers will be able to assess the additional costs.

Finally, because additional rights can be a price related factor, consideration should be given in the contract evaluation criteria for the relative value of the additional rights in the same manner that is encouraged for warranties by DFAR 211.7004-1(i).

Recommendation

Replace subparagraph 227.502-3(b) with the following:

If the Government has a need for rights not conveyed under licenses customarily provided to the public, the Contracting Officer shall prepare a written justification for the additional rights needed which shall be

⁴ For example, additional rights would, by necessity be provided at some additional cost to the Government. However, the very definition of not being "customarily provided" in the commercial marketplace will mean that the price for the additional rights, if negotiated after contract award, will require the submission of cost or pricing data, something that most commercial software manufacturers cannot do without incurring an enormous expense.

approved at a level above the Contracting Officer. The additional rights needed shall be clearly specified in the solicitation. Evaluation factors included in the solicitations shall be structured to permit consideration of the relative value to the Government of the additional rights required. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

(c) If the Government determines that additional rights are needed after contract award, the Contracting Officer shall prepare a written justification for the additional rights needed which shall be approved at a level above the Contracting Officer. The Government shall negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

227.503 Noncommercial computer software and noncommercial computer software documentation

Although the heading of this Section states that it is applicable to noncommercial computer software and noncommercial computer software documentation, the vast majority of the references are to the much more broadly defined computer software and computer software documentation. Indeed, there are only two references to "noncommercial" computer software or documentation in the entire section. See 227.503-5(c) and 227.503-6(c). As a result, because of the numerous references to computer software and computer software documentation Government officials and others could easily be misled to believe that the numerous requirements of the Section apply to truly commercial as well as software and documentation developed at least in part with Government funds.

Those requirements, when applied to the products developed and manufactured by BSA members without any government funding, are extremely onerous and costly and are inconsistent with commercial practices. For example:

(1) Subsection 227.503-4(a) grants the Government "irrevocable license" in "computer software or computer software documentation." Many commercial software licenses are, in fact, revocable if the user violates the terms of those licenses.

(2) Subsection 227.503-5(a)(2) states:

The Government obtains an unlimited rights license in--(2) Computer software documentation required to be delivered under this contract.

Ms. Angelena Moy August 19, 1994 Page 10

As defined by Clause 252.227-7014(a)(15), the term:

Unlimited rights means rights to use, modify, reproduce, release, perform, display, or disclose, computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

A literal reading of the proposed regulations means that all computer software documentation delivered to the Government can be reproduced without cost by anyone in the Government or by anyone authorized by the Government. Such broad and unfettered authority is certainly inconsistent with the stated policy of Subsection 227.502-1(a) that states "Commercial computer software documentation shall be acquired under the licenses customarily provided to the public. . . ."

(3) Subsection 227.503-5(a)(4) states:

The Government obtains an unlimited rights license in--Computer software or computer software documentation that is otherwise *publicly available* or has been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting form the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party.

Emphasis added. The term "publicly available" is an undefined term in the proposed regulation as well as in the FAR. A literal interpretation of the term would describe all commercial computer software defined by the proposed regulations and would mean that the Government receives unlimited rights in commercial software.⁵ The term is, in fact, unnecessary because the clear intent is to provide the Government with unlimited rights for software or documentation that has been released without restrictions as delineated in the second clause of paragraph (a)(4).⁶

⁵ BSA recognizes that the term is also used in existing regulations. BSA is unaware of any case law that has interpreted this term so broadly. However, the proposed regulations provide DOD the opportunity to appropriately eliminate completely any such misinterpretation.

The concept of publicly available without restrictions is actually used in the proposed regulations at 227.403-13(c)(1)(i).

Ms. Angelena Moy August 19, 1994 Page 11

(4) Subsection 227.503-10(b), by invoking the requirements of Clause 252.227-7014, requires:

A contractor who desires to restrict the Government's rights in computer software or computer software documentation to place restrictive markings on the software or documentation. . . .

Because Clause 252.227-7014 is inserted in all solicitations for software or documentation except for those that are exclusively for commercial software or documentation, this subsection and clause will require commercial software manufactures to continue to mark all software manufactured with the appropriate government markings. Once again, this is inconsistent with the clear policy of Subpart 227.502 to purchase commercial computer software "under the licenses customarily provided to the public. . . ." Furthermore, because a software manufacturer is unaware at the time software is manufactured whether it is destined for purchase by the Government, all software manufactured must be marked in order to avoid the draconian result of giving the Government unlimited rights in unmarked software. This subsection continues unnecessarily the need for software manufactures to mark with Government prescribed markings all software manufactured.

(5) Subsection 227.503-10(c) states:

Computer software or computer software documentation delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction.

The literal interpretation of this regulation states that unmarked "computer software or computer software documentation," which includes commercial software and commercial computer software documentation, is delivered to the Government with unlimited rights unless marked. There is currently no exclusion in the draft regulations for commercial software and documentation that is supposed to be bought pursuant to commercial terms.

(6) Subsection 227.503-11 requires contractors as well as software manufactures to establish written procedures and maintain records in order to be able to justify restrictive markings. The subsection states:

a contractor, and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, to establish and follow written procedures to assure that restrictive

Ms. Angelena Moy August 19, 1994 Page 12

> markings are used only when authorized and to maintain records to justify the validity of restrictive markings.

This requirement is inconsistent with the policy set forth that commercial computer software and documentation are to be bought pursuant to commercial terms which do not require records to be kept and made available for government audit.

Recommendation

Replace the term computer software and the term computer software documentation with noncommercial computer software and noncommercial computer software documentation each and every time they appear.

Conclusion

The Business Software Alliance applauds DOD's effort with regard to the proposed regulations. It is important, however, that the regulations be amended to ensure that commercial software developed without any government funding or assistance is sold to the Government under the same terms and conditions as it is in the commercial marketplace in order to receive the benefits of increased competition and lower costs. With implementation of the changes proposed above, BSA strongly supports the adoption of the new regulations.

Sincerely,

Robert W. Holleyman, II

President

#31 819194

COGR

an organization of research universities

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August 18, 1994

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Deputy Director Major Policy Initiatives 1200 South Fern Street Arlington, Virginia 22202-2808

ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR Case 91-312

Dear Deputy Director:

The Council on Governmental Relations (COGR) is pleased to provide comments on the proposed rules for amending the Defense Federal Acquisition Regulation Supplement: Rights in Technical Data, published for comment at 59 FR 31584, June 20, 1994.

COGR is an organization with a membership of 138 U.S. research universities. These universities are engaged in research activities funded by the federal government and virtually all receive some support from the Department of Defense under research and development contracts that will be subject to the new rules. The strong interest of the academic community in data rights and computer software was recognized by the Congressional requirement that the academic community be represented on the government-industry advisory committee.

I. General State of Support

For the most part, the interests of the universities as data and software developers parallel those of the industry Over the past two decades, significant advances in computer software technology, particularly, have had their origins within the U.S. research university The Department of Defense (DOD) has funded community. advances in computer hardware design, parallel processing, artificial intelligence and systems integration software from the university community, causing the research universities to become major contributors to U.S. defense and economic competitiveness capabilities. Yet, over the past decade, the university developer community, like its industrial counterpart, has found that federal government inhibit rights rather than encourage industrial commercialization of DOD funded computer hardware and software technological advances. COGR views the proposed rule changes as a major step forward in addressing an imbalance in the allocation of rights which has hampered university efforts to effectively transfer computer-related technology for commercial development.

We believe these improvements in DOD procurement regulations will encourage industrial investment in university-generated data and computer technology and will reduce the barriers to government-industry-university partnerships in research.

II. Specific Endorsements

<u>Government Purpose Rights for Computer Software Developed</u> With Mixed Funding

The vast majority of research universities in the United technology transfer developed strong States has Bolstered by the passage of the Bayh-Dole capabilities. Act in 1980 (P.L. 96-517) giving universities the right to retain ownership of and to commercially license inventions developed under federal funding, universities embraced technology licensing as a significant and effective mechanism for converting basic research to a tangible public benefit. While Bayh-Dole provided a framework that encouraged commercialization of patented technology by reserving to the government only the rights necessary to meet the government's mission objective, there was no such corollary for unpatented technology. Conversely, the government's unlimited rights in data has prevented universities from retaining sufficient rights in computer software necessary to induce private investment. result, much has been left to languish in the public domain - too complex for the ordinary private citizen to use, too much of a risk for private company capital investment.

By declaring that computer software developed with mixed funding will entitle the government to a government purpose license, but not to unlimited rights, the proposed regulations will provide universities with the residual rights necessary to successfully attract commercial partners for transferring the software into Furthermore, it will encourage computer marketplace. software companies to provide private funding for universities to enhance, port to new platforms and further develop computer software initially created with DOD funding.

One disadvantage is the five year limitation on government purpose rights which universities do not endorse as a reasonable standard term. Indeed, it appears arbitrary. Instead, we recommend an unlimited period as long as the public has reasonable access to the product. The five year term imposed by the new regulations does not take into account the development time, private resource investment, necessity for maintenance, user interest in enhancement at private expense, or any other criteria based on marketplace realities. Further comments on the five year government

purpose right term limitation are provided in the Recommendations section of this letter.

Elimination of "Required for Performance"

The "required for performance" category enabling the government to claim unlimited rights in both technical data and computer software developed solely at private expense has stood as a major example of preferential treatment demanded under government procurement programs. COGR commends the advisory committee on recognizing that "required for performance" fails both a fairness test and the source of funds test and should be eliminated. Its elimination will remove a barrier to industry-university-government partnerships especially within the computer industry where companies have been unwilling to risk losing "core" systems to unlimited government rights.

<u>Indirect Cost Treatment</u>

While this clarification in the proposed regulations will have little direct effect upon most universities, redefining development costs charged to indirect cost pools as private expense will eliminate yet another barrier to industry-university-government programs. Recent university experiences under the Technology Reinvestment Project have shown clearly that companies that do not traditionally do business with the government are unwilling to participate in consortia or joint ventures where developments routinely charged to indirect costs pools might become subject to government rights. The universities are encouraged that this change in the DOD regulations will permit more joint venturing with companies and particularly with small businesses that generally are not government contractors.

Separation of Computer Software from Technical Data

Separating computer software from technical data recognizes technological reality and is endorsed. The separation makes it possible to more clearly define the allocation of rights where new or specific legal theories may be applied to computer technologies, and also takes into consideration the reality that computer software is often a high-value marketable product whereas technical drawings, reports, evaluations generally are not. The Committee recommendation that the government accept negotiated license rights in computer software that is developed as a commercial product, regardless of source of funds, will powerful encouragement for universities aggressively pursue timely transfer of computer software to the marketplace.

III. Shortcomings/Recommendations

Five-Year Limitation on Government Purpose Rights

COGR strongly opposes the five-year limitation placed on government purpose rights. The specter of the government asserting unlimited rights after a period of only five years is a great disincentive to private investment and ensures mediocrity in product development. limited period of commercial exclusivity commercial developers will forgo innovation and capital investment in quality products in favor of product shortcuts and quick profits. Success in transferring university-developed software, rarely ready for public use when a research project is finished, depends directly upon industry's positive calculation of development and marketing costs A five year exclusive versus expected market share. marketing period, measured from the contract date, is insufficient to induce commercial investment. five years of government purpose rights will not establish five years of commercial benefit to the contractor because no product is ready for marketing at the beginning of a contract period. At best, it may be ready for the commercial market place only by the end of a contract and at worse, much later. Consequently, the five year limitation as a benefit to the contractor is illusory and it will continue to provide a strong disincentive for commercial investment.

The universities would also point out that the short duration of government purpose rights ensures that small or start up businesses, the major job creators in this country, will not become university licensees. By the time the commercial potential or product is realized, generally at the end of a contract period, there will simply not be adequate time for a small or start-up business to raise the necessary capital to bring the product to the marketplace. COGR urges a reexamination of the five-year limitation. Replacing it with (i) an unlimited period as long as the public has reasonable access to the products; or (ii) a limited period, but keyed to first commercial sale; or (iii) a preferentially longer period for small businesses would all have merit.

If the current proposed language is left unchanged, we urge DOD to emphasize in its guidance to contracting officers that longer period of GPRs are to be looked upon favorably as long as the contractor or its designee is diligently pursuing commercialization.

Marking Requirements

The university community joins its industrial counterparts in vigorously opposing the "mark or lose it" mandate of the While the Committee's recommendations do regulations. include a triage clause that would allow the contractor to cure a situation where unmarked or mismarked data or computer software finds its way to the government, the requirements are extremely burdensome and punitive. Moreover, we believe, they are wrongly based on the concept of data "provided" or "furnished' to the government rather than on data and computer software which are deliverables. The collaborative nature of many university research programs, especially those involving industry/government joint ventures or consortia, places privately developed data and computer software at extreme risk of inadvertently falling into government hands without marking. Erecting barriers on collaborative research programs is never productive, but in this case it is detrimental. universities and their industry partners may lose valuable rights through well intentioned sharing of information with government colleagues because of a failure to mark, then such collaboration becomes a risk factor. COGR urges a reexamination of the "marking" requirements to provide better protection for data and computer software to which the government may have access but which is not a "deliverable."

IV. Concerns Specific to the Research University Community

Unlimited Rights in Studies, Analyses or Test Data

A significant portion of university research funded by DOD falls into the categories of studies, analysis, testing, evaluation and like theoretical investigation. programs provide excellent training for students as well as providing information of use to the government and to In fact, much of the basic research done by universities falls into these categories as a convenience for separating Defense 6.1 funding from Defense 6.2 funding. The university community takes issue with placing technological data relating to these categories under unlimited rights regardless of the source of funds. Very often testing and evaluation projects undertaken in universities require use of third-party owned materials. Since data from such activity may reveal commercial trade secrets, access to third-party owned materials is difficult to obtain if the government will be entitled to unlimited rights in data. We believe that data derived from testing, evaluation, and analysis should be subject to a source of funds test and should not automatically carry unlimited rights. COGR recommends modifying the definition of this category of unlimited rights data to specifically address these concerns.

<u>Obligations of Indemnification Under Nondisclosure</u> Agreements

The university community has a major concern that accepting Government Furnished Information with Restrictive Legends will expose them to indemnification liability that is not tenable for nonprofit educational institutions. The new language proposed for the "Use and Non-disclosure Agreement" at 252.227-7025 requires recipients of GFI marked with restrictive legends to indemnify the government for the recipient's use and misuse of the information and for the use or misuse by any third party to whom the information is released. COGR believes that the burden for third-party use should be shifted to the third party and urges substitution of a contractual requirement that permits disclosure only to third parties who have agreed to indemnify the government for the misuse or unauthorized release of the GRI.

V. Conclusion

Overall, the university community sees the Committee's recommendations as positive movement towards a more balanced procurement policy. However, the proposed rules still fall far short of recognizing how business is done in the commercial marketplace. While the universities acknowledge the special needs of government procurement, we believe that procurement goals should be better balanced with Administration goals of dual-use conversion. competitiveness and encouraging job growth in the major industries and small businesses. Subjecting procurement to a serious "government needs" test would signal a major change in thinking, and might well result in cost reductions. COGR endorses the adoption of these new proposed rules as a staging platform for the next step which would see the government pro-actively encourage and recognize industry cost-sharing, private innovation, industry-university-government partnerships and university technology transfer as worthy goals of government procurement.

Sincerely,

Milton Goldberg

Tuilton Goldberg

A Subsidiary of Vesper Corporation

August 11, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 South Fern Street
Arlington, VA 22202 2808
ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP

RE: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. Columbia Gear has been manufacturing defense related products for over 20 years.

We at Columbia Gear are legitimately concerned that these changes will negatively affect our business opportunities. We are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

- Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.
- Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)
- We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.



The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data <u>developed--according to any formula--with any of our tax dollars.</u>

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the \$500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

Lyle Nuhring

General Sales Manager

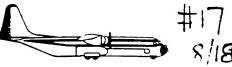
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Senator Joe Bertram

Congressman Collin Peterson

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DERCO INDUSTRIES, INC.



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11 August 1994

Deputy Director
Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808

Attn: Ms. Angelena Moy, OUSD (A+T) DDP

Ref: DAR Case 91-312

Dear Deputy Director Moy:

As a member of the small business community serving the Department of Defense and the Commercial market, I submit comments to the proposed rules as detailed in the June 20, 1994, Federal Register, 807 Committee.

The overall affect of the proposal changes will have a devastating effect on the small businesses that currently act as Department of Defense contractors and subcontractors. We are opposed to any changes which, in affect, reduce competition, increase costs, and place an undue burden on the small business community and the tax payers.

- 1. The proposed change to limit technical data charged as indirect costs to limited rights status will inhibit competition. An Original Equipment Manufacturer can adjust the way development costs are credited, thereby ending the DOD's free access to the technical data they have funded. The result will be increased costs and less competition.
- 2. The proposed change to eliminate the requirement for DOD obtaining unlimited rights when data was developed under a government contract will also inhibit competition. Again, when the DOD has funded the development of the data, DOD should have the right to use the data to encourage competition and lower future costs.
- 3. We oppose a mix of private and government funding for development resulting in 5 years of Government Purpose Rights, without imposing a percentage guideline. A nominal investment can engender an OEM to 5 years of exclusivity and over-priced spares. To allow for adequate recoupment of DOD investment, a 50% threshold for private investment should be added to the rule.
- 4. We also oppose the rule stating the DOD will be given data rights only as customarily provided to the public. The basis of private agreements should not be implemented in DOD contracting, as this will further reduce DOD's return on investment for technical design, thereby increasing overall costs.

Any efforts to amend the technical data rights regulations must be evaluated by the entire industry and studied carefully for the impact on all sides of the defense industrial base. A committee should include OEM's as well as DOD and small businesses. The end result must not be unnecessarily increased defense costs, restricted competition, and a weakening of military readiness.

Best Regards,

Mark Hoehnen General Manager

Derco Industries, Inc.

Enclosures:

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Representative Tom Barrett 313 Cannon House Office Building Washington D.C., 20515

The Honorable Ron Dellums
Chairman
House Armed Services Committee
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Washington D.C., 20515-6035

Electro-methods, Inc. Attn: Donald M. Judson, President P.O. Box 54 330 Governors Highway South Windsor, CT 06074

The Honorable Dale Bumpers Chairman Committee on Small Business United States Senate Russell Senate Office Build6 The Honorable Senator Russ Feingold 502 Hart Senate Office Building Washington D.C., 20510-4904

The Honorable Sam Nunn Chairman Senate Armed Services Committee Dirksen Building, Room SD303 Washington D.C., 20510

The Honorable Jere W. Glover Chief Counsel Office of Advocacy U.S. Small Business Administration 409 3rd Street, S.W., 7th Floor Washington D.C., 20416

Wisconsin Procurement Institute, Inc. Attn: Barry Holland 840 Lake Avenue Racine, WI 53403-1566

The Honorable Larry Pressler Ranking Minority Committee on Small Business United States Senate



August 18, 1994



Ms. Angelina Moy OUSD (A&T) DDP 1211 South Fern Street Arlington, VA 22202-2808

Subject: DAR Case 91-312

Dear Ms. Moy:

This letter is in regard to the subject DAR Case.

First of all, I want to emphasize I support your effort to update the Federal Acquisition Regulation Supplement "Rights in Technical Data". Although my views are represented in the more comprehensive letter from the IDCC committee signed by Mr. Frank Abbott, there is one item which I would like to comment further on - that is the stated five year period for Government Purpose Rights.

The way the proposed change is written the five year period commences with the effective date of the contract. If it is a three year contract, which is common, it would mean that at the completion of a contract there would only be two years remaining to introduce a product and develop a market. For high technology materials, such as Dow Corning produces and sells, it commonly takes five to ten years to develop a market for a product. An extreme example is continuous ceramic fiber tow. Dow Corning and many other companies have been carrying our research, development and marketing products for greater than 15 years. Furthermore, many companies have been selling ceramic fiber tow for 5 years or more. I doubt that any company is satisfied or encouraged with the development of the market to date. Unfortunately, it will probably take at least another 10 years to develop an attractive market for ceramic fiber tow. In this situation a 5 year Government Purpose Rights would be inadequate.

I realize that the proposed change, five year period is followed by "or such other period as the parties negotiate". My fear is, however, that the COs will view this as the recommended period, and will be difficult to move to a more reasonable period. I would recommend not mentioning a specific period, simply state a reasonable number of years will be determined in negotiations. If you feel a

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number of years is required it would be more equitable to cite a range such as 5 to 17 years. A third alternative would be to have the Government Purpose Rights period start at the termination of the contract.

I appreciate the opportunity to comment on this important effort to update the DFAR regarding Rights in Technical Data.

Sincerely,

Ward Collins

Sr. Manager, Cooperative R&D

Dow Corning Corporation Phone: (517)-496-6114

Fax: (517)-496-5324

sk.moy.a3

17 Aug 94

From:

Barry Dube'

2150 Duckwalk Court Waldorf, Md 20602

To:

Deputy Director

Major Policy Initiatives

1200 S. Fern St.

Arlington, Va 22202-2808

Attn: Ms. A. Moy

Subj: DFAR CASE 91-312 COMMENTS

Dear Ms. Moy,

Attached are my comments concerning the subject Case. I am employed in the area of technical data acquisition and application, and generate my comments from my 14 years in this business. As a taxpayer, I felt it important to identify impact areas, both bad and good. Most of the proposed changes are acceptable, however, several areas negetively affect the government's ability to properly operate because of conflicting mandates between Public Law and Defense regulations, or acquisition process controls.

The attached document contains for each problem a problem statement, proposed correction, and brief reason for correction need. Many corrections reflect an approach of teaming with the offerors/contractors, where both parties keep each other's needs in perspective and neither side has an overwhelming advantage. Of note is the comment for mixed funding and the beneficial partnering that can occur if the correction is implemented, and the comment for Competition in Contracting Act (CICA) impact.

I look forward to hearing from you. If I can be of any further assistance, please contact me at the above address or evenings at (301) 843-0653, days at (301)221-8876.

respectfully.

Barry Dube

Reader note: Subpart 227.4 (Rights on Technical Data) proposed changes are considered acceptable except where commented upon.

1. 227.403-1 (Policy)

Problem: As written, this subparagraph has two problems:

First, 227.403-1(e) is in direct conflict with policy defined at 227.403-2(b)(1) because the former disavows competitive reacquisition of form, fit, or function identical items and the latter requires such action.

Second, 227.403-1 (e) is in direct contradiction with Competition In Contracting Act (CICA) (i.e. Public Law 98-369). CICA compliance requires competition and other socio-economic support, such as small business set aside or minority owned businesses. Other derivative programs, such as DOD Spare Parts Breakout Program, will also be effectively terminated by this policy.

Correction: Add as new subparagraph at 227.403-1(e), as (3) the following: "(3) The selected lifecycle support methodology shall be "contractor life and type" support and the anticipated item service life does not exceed 7 years." Life and type means no internal to DOD organic support.

Reason: Only short life span items/products are suitable candidates for commercial organic support or for negating CICA benefits. This must be a controlling consideration. Conflicting criteria must also be removed.

2. 227.403-4(a)(1) (License Rights) and 227.403-5(b)(1)(i)

Problem: (a) These two sections do not define or place objective boundaries as to what "mixed funding" represents. This vagueness is untenable. By a contractor's spending the symbolic one (1) dollar as part of an indirect cost pool, he would be permitted to claim mixed funding and apply government purpose rights almost without hindrance. (b) Furthermore, there is no incentivization to promote commercial investment as part of clause - which is what it's purported reason was claimed as being.

Correction: (a) Modify as follows: In the third sentence, after the words "..funding, the Government," insert the following text: "in accordance with the below schedule.".

(b) After third sentence, indent and add this following schedule:

MIXED FUNDING INCENTIVIZATION FORMULA:

For every ten percent increment of private funding applicable to the data in the areas of direct costs (i.e. excluding general and administrative), the contract terms except as excluded above, shall (a) permit application of government purpose license rights to technical data for a period of one calendar year for each ten percent increment, and (b) create provisions to utilize dedicated contractor support for the product, item, or process for a period of one-half (.5) calendar year for every ten percent increment of funding. For increment values over sixty percent, the contractor and government will enter into negotiations for application of DFAR Appendix D, Component Breakout. Rounding of increment values shall apply the following rule to the "ones" digit: "Ones" values less than or equal to five, round to the nearest "tens" position; "ones" value greater than five, round to the next higher "tens" position." (e.g. 13<15, round to 10; 47>45, round to 50).

Note: The clause at 252.227-7013(b)(1)(ix)(B)(2) should be changed also to reflect this formula vice the 5 year period currently stated. Formula can be placed in either location, with 252.227-7013 being the preferred location.

Reason: As written, these sections do nothing to either forge a genuine incentive program for offerors and contractors or provide for the government to benefit from the partnership. The recommended rewrite provides for a fair and equitable socioeconomic rule for both parties. Additionally, it's time schedule permits proactive and flexible program office implementation of lifecycle support requirements consistent with DODI 5000.2 and availability of funds and resources at various points of the program's lifecycle. In short, it's reinventing government so that both Industry and the DOD reap maximum benefits while encouraging creativity.

3. 227.402-1 (Commercial Items or Processes)

a) Problem: Subparagraph (a) (1) Prohibits DOD from acquiring data needed for the crucial lifecycle functions of rework and spare parts replacement. These are separate and distinct lifecycle functions that, if omitted, render the hardware in need into a non-mission capable (NMC) status. The only circumstance where this is not present is disposable parts. NMC status for most weapon systems hardware is untenable under most conceivable scenarios.

Correction: Two part correction needed: Part one is to insert the terms "government rework" and "procurement of suitable replacement parts" in the first sentence of (a)(1) after the words "... repair or maintenance." The second correction is to add a new subparagraph (3) under (b) as follows: (b)(3) comply with 227.402-1(a) when life and type organic support has been contracted for from the offerors and contractors.

Reason: a) This correction allows DOD to provide for lifecycle support necessary to preclude NMC status.

- b) Provides for alternate course of action to DOD to permit our better utilization of commercial capabilities to perform organic support. This action is in line with elimination of specifications and DOD data rights erosion.
- 4. 227.402-2 (Rights in Technical Data)

Problem: Subparagraph (a) is in direct conflict with the implementation of the clause at 252.227-7015. Specifically, this clause (227.402-2) makes the statement that DOD use of such data is limited to internal DOD functions, the "Generally" caveat not withstanding; however, the clause at 252.227-7015 permits unlimited application of "form, fit, and function" data. Form, fit, and function data will be extensively used both internal to DOD and external by suppliers/competitors to furnish either spare, replacement, or repair parts needed to keep contractors' commercial products operational. The conflict between text and intent must be remedied.

Correction: Modify 227.402-2 (a) as follows: Second sentence delete the word "Generally"; in place there of insert the

following phrase. "With the exception of technical data addressed at 227.402-1(a)(1) and 227.402-1(a)(2)."

Reason: Provides clarification and allowance of use of form, fit, and function data products for repair, rework, and spares support.

5. 227.403-1(b)(2):

Problem: This statement is vague in meaning as to just what "acceptance of technical data" means. Very extensive corporate experience in specifying and enforcing contracted for data requirements under this phrase proves that it is too nebulous to realistically apply as is.

Correction: Delete existing sentence and substitute in place the following:

- (2) Establish or reference both contractor/offeror and DOD data managers procedures to be applied to determine the following:
 - (a) Suitability of technical data for intended lifecycle support usage as defined by program Acquisition Plan (AP) or Integrated Logistics Support Plan (ILSP), and
 - (b) Compliance with contractually specified ordering provisions.

Reason: The term "acceptability" is not specific enough and frequently causes dissension between supplier and buyer. Rather, the usage of acceptable to perform expected lifecycle task and acceptable to contractual provisions need to prevail and be defined.

6. 252.227-7013: Omitted from the definitions

Problem: Section is the topic of "Copy Right." Copy Right issues are frequently surfacing as contractors attempt to apply copy rights to technical content of technical data, versus classic authorship. This abuse must be stopped.

Correction: Include under definitions, the reference to P.L. and short definition of copyright as follows: "Copyrights: See 17

U.S.C. 102; defined as works of authorship that exclude protection of application to ideas, procedures, processes, regardless of form, in which described, explained, or otherwise illustrated."

Reason: Correct problem area suffering from misapplication and abuse.

7. 252.227-7013 Alternate 1 (xxx1994)

Problem: By nature of its language, this clause will systematically prohibit the government form entering into competitive acquisition for many years (not just 2-see subpar. 3) after the date of any contractually ordered, unlimited rights technical data products. The government, to comply with Freedom of Information Act (FOIA), as well as put out bid sets in anticipation of competitive contract activities, often publishes the data in question immediately after receipt. By stringing the DOD along with undelivered technical data, the development contractor could (probably will) exercise this clause and effectively stop competition of the development or production efforts; i.e. it makes the contractor sole source until he decides to release (allow the DOD to publish) the technical data to general public.

Correction: a) Best alternative: Delete this alternate in its entirety. It has too severe an impact to competition of major acquisitions to permit.

b) If deletion not possible, mitigate danger to competition by inserting new sentences at end of subparagraph (3) as follows:

"This limitation, however, shall not preclude or inhibit DOD engaging in competitive acquisition activities. The contractor shall be required to abide by Freedom of Information Act and furnish any data within the reasonable schedule establish by the DOD contracting officer."

Reason: The DOD competition process, mandated by CICA, could be severely hampered by contractors "dragging their feet" in supplying unlimited rights technical data to potential competitors.

- 8. Note: This problem also applies to 252.227-7014 alternate 1.
- 9. 252.227-7015 (Technical Data Commercial Items)

Problem: This clause is silent as to use of technical data for the purpose of internal Government use of maintenance, repair, and rework. If policy is silent as to expectations of partners, it <u>will</u> become a point of dissension.

Correction: Add new subparagraph as (b)(1)(v) as follows:

"(v) Are needed for purposes of internal government functions of maintenance, repair, and rework."

Reason: If DOD cannot repair, rework, or maintain the item through the form, fit, and function data, weapon system non-mission capable status will result, or conversely, the implication is either mandated (by default) development contractor support for as long as item is in inventory, else the item is disposable.

LECTRO - METHODS, INC. P.O. BOX 54, 330 GOVERNOR'S HIGHWAY SOUTH WINDSOR, CONN. 06074 FORWARDING AND RETURN POSTAGE GUARANTEED

ELECTRO-METHODS, INC.

COMMENTARY - DAR CASE 91-312



tro-methods, inc. TEL (203) 289-8661 - FAX (203) 289-1868 - TWX (710) 425-6016

P.O. BOX 54, 330 GOVERNORS HIGHWAY, SOUTH WINDSOR, CT 06074

uly 22, 1994

eputy Director lajor Policy Initiatives .200 S. Fern Street Arlington, VA 22202-2808

Attention: Ms. Angelena Moy / OUSD

Subject: DAR Case 91-312 - Pentagon Acquisition Reform

Dear Ms. Moy:

the purposes of establishing Electro-Methods credentials of knowledge xperience, we would point to our 23 plus years of spare parts direct contracting with the U.S. Military at a number of depots and overhaul and repair facilities. In 1993, Electro-Methods had a contract dollar volume with Tinker Air Force Base of 16.1 million. This figure placed EMI at number 19 of the top 20 at Tinker. We have attached a "breakout" chart of our dollar volume with individual services and/or specific facilities. Electro-Methods has been a valued supplier to allied nations and their (MTU), France, Germany These include manufacturers. (Ishikawajima), Taiwan (North American Council), Australia (Air Force), The Netherlands (Philips-Eindhoven), Denmark (Air Force) Norway (Jet Belgium (Fabrique Nationale), Canada (RCAF), Israel Norsk), Shemesh)-Israel, Israel Procurement Mission, Turkey Air Force. EMI is a designated alternate source for 1600 components and/or assemblies. facilities utilize the latest in metalworking equipment such as computer design/computer assisted manufacture, programmed machines, several welding units including vacuum stations, plating facilities, heat treating furnaces, non-destructive test departments, Electro-Methods employs more than two electrical discharge machines. hundred individuals. EMI has had an "in house" DCAS representative inspector since 1972. The company operates employing statistical process control and total quality management.

'age 2: DAR Case 91-312 Pentagon Acquisition Reform

SUBJECT: CASE 91

The current "reform" measures for the proposed Pentagon Procurement First, the participation of small Program are of concern for us. business personnel was limited to one member on the 807 Group. A second issue of concern which flawed in that there was a failure to seek suggestions from current competition advocates and "on line" procurement personnel i.e. Contracting Officers. In listening to and reading of the deliberations of the 807 Group, there seemed to be a propensity of the Major Prime Contractors/Original Manufacturers to the determent of Small Business. There appears to be a program of isolating the Small Business Independent Contractors from the spare parts logistical support market place, substantially increase the cost of replacement parts. In fact, the revisions proposed by Group 807 will cause DoD to be paying more for less and seriously impeding our DoD military services readiness factor. urn is just one element which would endanger the national security of U.S.A.

As conceived by the 807 Group, our allies utilizing U.S.A. designed weapons systems would procure their logistical support replacement parts from either the OEM's and/or the Department OF Defense. This does not take restraint of trade into consideration the fact that these allies have procurement missions established in the U.S.A. which have sought out and utilized the Small Business Defense Contractor in obtaining parts at keeping costs at lower level than those via OEM/DOD. Another benefit to our allies is a shorter delivery cycle permitting a lower level of inventory. This direct acquisition minimizes the paperwork load. Which is a major element in administration costs.

Entrusting administration to OEM's would seem to be disregarding the sorry performances of the OEM's in performing services in the military sector. There is a litary of malpractice situations. Witness the attached news articles. We list the OEM's and the fines imposed by Governmental Legal Actions.

General Electric
UTC/Sikorsky
Teledyne
McDonnell Douglas
Deing

2, Case 91:

It is noteworthy that in most instances the various waste, fraud and abuse acts were uncovered by whistle blowers as versus the U.S. Government surveillance bodies - DCAA, GAO, Congressional Committees. To shift administration to the OEM's would be giving them keys to the treasury and the combination to bank safe.

There would be a potential conflict of interest should the OEM's be placed in charge of selecting alternate sources for individual parts and/or assemblies. We are aware that many OEM's have alliances with and percentile ownerships of foreign manufacturers. This beclouds the competitive market and has the potential to export the jobs of the nation's sillilled labor force. We recognize the global economies of today's world are such that "offsets' are a way of life. In accepting this reality, we would believe that offsets come from the commercial side of the corporate business. This would permit the stipulation that Defense dollars be spent in the U.S.A. thereby maintaining the actual metalworking manufacturing infrastructure. The GAO finds offsets of as a wed policy.

LEGAL ACTIONS

BOEING

Paid 75 million

covering "mischarges"

on contracts.

Wall Street Journal

LITTON

INDUSTRIES

Paid 3.9 million

Gov't charge of conspiracy

and wire fraud.

Paid 82 million

Fine for overcharging.

L.A. times

Rolling Stone

GENERAL ELECTRIC

Paid 130 million

16 instances involving

false billing, money

laundering, weapons

procurement fraud, bribery,

Israel, Saudi Arabia & Egypt.

Falsification of test results

Cleveland plane dealer.

Whistleblower

awarded 13 million of

a G.E. 59.5 million for

fraud.

GRUMMAN CORP. Paid 20 million

for improper financing

dealings.

Washington Post

Journal Inquirer

LOCKHEED

Investigation of bribery in

Korea cited for possible

violation of foreign corrupt

practices act.

Wall Street Journal

LUCAS INDUSTRIES

Paid 12 million

supplied subquality parts

used by F18 aircraft.

Wall Street Journal

e 2, Legal Actions:

LEGAL ACTIONS

M	C	D	0	N	N	E	L	L
		D	0	U	G	L	A	S

Air Force Officers refuse to testify on 1.5 billion cost overruns.

Associated Press

KAMAN CORP.
RAYMOND
ENGINEERING

Paid 765,000. fine for overcharges.

Hartford Courant

TELEDYNE

Paid 112.5 million result of whistle blowers efforts

Wall Street Journal

Indicted for Illegal export of munitions

Wall Street Journal

pellets

UNITED TECHNOLOGIES Sikorsky / Saudi Arabia bribery.

Hartford Courant

Paid 150 million for overcharging.

Hartford Courant

Overcharges of Israel purchases thru General Dotan of Israel Air Force

Hartford Courant

Hamilton Standard cited for price increases from 8 million to 23 million in 3 years for space shuttle

Washington Times
Hartford Courant

design.

Boeing Agrees to Pay U.S. \$75 Million To Settle Allegations of Mischarging

By Roy J. Harris Jr.

Staff Reporter of THE WALL STREET JOURNAL Boeing Co. admitted that it mischarged the federal government for defense-contract costs and agreed to pay \$75 million to settle the government's claums.

In Seattle, the U.S. attorney's office announced that the settlement resolved three separate investigations, conducted over six years, into allegations of Boeing mischarges that involved thousands of programs between 1980 and 1991. U.S. Attorney Katrina Pflaumer said actual mischarges were far less than 575 million. and that Boeing's payment "includes interest, penalties and the cost of our investi-

But Boeing disputed the government's contention that the settlement included penalties. Ms. Pilaumer wouldn't say how much the government would count as a penalty amount and noted that the agreement with Boeing was aimed at producing "a tax-neutral settlement." Generally. penalty payments wouldn't be deductible. Overhead Costs

The government said its investigations involved several agencies and a federal grand jury. One eight-year criminal invesdgardon, it said, had looked into allegations that Boeing violated the federal False , Claims Act by improperly charging to U.S. contracts "millions of dollars in research and development costs, which Boeing falsely characterized as overhead associsted with Boeing's manufacturing and production efforts." The accounting "improperty shifted costs to the government which should have been absorbed by Boeing," the U.S. said.

It said mischarging was "particularly egregious in Boeing divisions that were exploring the application of artificial intelligence to computers." According to Ms. Pflaumer, the involvement of artificial intelligence spread the mischarging activity "over literally thousands of different contracts." Some major artificial-intelli-

gence programs dealt with space-static environmental systems and military at. craft command and control systems, th sovernment said.

In setting, the U.S. said. Boeing als admitted "improperly charging to govern ment contracts several million dollars in foreign direct selling costs" It incurred and mischarging "for millions of dollars in hazardous-waste disposal costs.

No Admission of Liability

A Boeing spokesman, questioned about the U.S. attorney's comments, conceded that "mistakes were made." But the 11page settlement document that Boeing signed stated that the company wasn't admitting any liability or any law viola-

While the big striiner maker and defense contractor has sufficient reserves to cover such payments, the spokesman didn't say how Boeing would account for

In Boeing's formal statement on the matter. Theodore Collins, vice president and general counsel, made no reference to mischarges. While "some unintended costclassification errors" were resolved, he said, the settlement's "real significance is that it resolves several long-standing accounting issues and establishes munually agreed-upon definitions and processes for the future." The statement said the U.S. attorney's office "had noted that Boeing cooperated in the settlement of the mat-

Kurt P. Hermanns, an assistant U.S. attorney on the case, said the investigadons had produced "insufficient evidence of criminal intent to defraud." The case started, he said, as the result of "some astute auditing work" by the Defense Contract Audit Agency. He called the government's note about cooperation from Boeing "a very narrow comment, in the context of the settlement negotiations

Litton Industries pleads guilty in defense-contract fraud probe

Los Angeles Times

WASHINGTON — Defense contracting giant Litton Industries Inc. pleaded guilty to federal fraud charges Friday and agreed to pay \$3.9 million in fines, civil claims and prosecution costs arising from the 1988 Ill Wind defense procurement scandal.

The negotiated plea marked the final case in a 7½-year-long Justice Department legal campaign that resulted in the conviction of 64 government officials, consultants and corporate executives from 10 defense contracting companies and brought in \$250 million in penalties.

The massive procurement scandal erupted in the mid-1980s at the peak of the military spending boom, and the ensuing investigation broke important new ground in the prosecution of white-collar crime, including the first use of wiretaps against corporate and government law-breakers.

It also brought a significant tightening of the procedures the Defense Department uses in doing business with contractors and outside consultants, ending the previous laxity that had allowed both sides to trade insider information and play favorites on big contracts.

In a statement issued after Friday's plea, Attorney General Janet Reno called the probe, which was begun during the Reagan administration, "one of the most successful... ever undertaken," saying it "fundamentally changed how white-collar crimes are investigated."

She predicted that the techniques honed in the III Wind prosecution would serve as a prototype for future investigations into crimes involving fraud in environmental, medical, insurance and consumer issues, as well as in government contracting.

The criminal charges to which

The negotiated plea marked the final case in a 7½-year-long legal campaign that resulted in the conviction of 64 government officials.

Los Angeles-based Litton pleaded guilty Friday alleged that executives of the company's Litton Data Systems hired consultants with contacts inside the Pentagon to provide them with confidential information needed to win Navy and Marine Corps procurement contracts.

Although Litton ultimately was unsuccessful — it failed to win contracts on two of the projects and decided against submitting a bid on a third after the probe became public — the government charged the company with conspiracy and wire fraud.

The incidents, which occurred between March 1987 and June 1988, involved contracts for the advanced tactical air command central, a multimillion-dollar Marine Corps radar and ground-control system; the AN/UYQ-21 electronic display; and a Marine Corps signal converter.

The two executives of Litton Data Systems — Thomas D. McAusland, former senior vice president of business development, and Christopher M. Paford, former business development director — were convicted in an earlier case.

Litton Industries, Inc., in a statement issued Friday, said it had pleaded guilty only because it technically is legally responsible for all actions taken by senior-level managers, but insisted that it had neither broken any law nor benefited from any of the deals.

Litton Unit Agrees to Pay \$82 Million To U.S. to Settle Contract-Padding Case

By DAVID J. JETTERSON

LOS ANGELES—A unit of Litton Industries Inc. agreed to pay the government \$82 million to settle a whistle-blower's charges that it padded government contracts to shift costs away from its commercial customers.

The Litton Systems Inc. unit had faced a potential liability of \$650 million in damages and penalties in the case, which was originally filed in 1988 under the False Claims Act, the so-called whistle-blower statute that allows private citizens to sue for fraud on behalf of the government. In addition to the \$82 million, Litton agreed to pay \$4 million to the nongovernment plaintiffs for attorneys fees.

In the suit, the government and former Litton employee James Carton, a technical director of the Litton Computer Services division of Litton Systems, alleged that Litton had systematically shifted computer-usage costs from commercial to military customers at its Woodland Hills, Calif., office. In some cases, Litton charged the government as much as 10 times more for the same work as it charged commercial customers. Assistant U.S. Attorney Howard Daniels, who handled the case, said. Litton masked the misallocation through a complex computerized accounting system, the plaintiffs alleged.

- The company settled the suit without any admission of wrongdoing or liability.

Mr. Daniels said it hasn't yet been decided how much of the \$82 million Mr. Carton and the other nongovernment plaintiff in the case, the Washington, D.C.-based nonprofit group Taxpayers Against Fraud, will receive, though they are entitled to between 15% and 25% under the Faise Claims Act.

Chairman Defends Position

"A decision to settle is a difficult choice when you believe your position is correct." Litton Chairman Alton J. Brann said in a statement. "This decision was made in recognition of the potentially significant amount at risk and the disruptive force of long-term litigation. The mutually accept-

able agreement fully disposes of an issue that could have taken several more years to resolve through the judicial process."

Litton's exposure in the case was significantly heightened in July 1992: A federal court judge, ruling on several issues in the case, found that Litton Systems had misallocated costs at the computer-services business, violating several procurement laws and overcharging the Pentagon by an estimated \$50 million.

If the case had gone to trial, Litton, a Beverly Hills-based advanced-electronics' and defense-systems maker, would have had to prove it didn't knowingly violate the law — despite evidence that the company consulted two accounting experts who told Litton its cost system was illegal. The ILS attorney's office in Los Angeles contended that Litton managers lied to government auditors and knowingly filed false papers with the government to conceal the "implement accounting practices."

Issue of U.S. Rules

John E. Preston, Litton's senior vice president and general counsel, said, "We believe that we correctly interpreted these complex government regulations, and that the Litton employees involved acted in good faith." He added: "It is our further belief that the accounting system in place at Litton Computer Services division actually lowered the costs to all customers, ally lowered the costs to all customers, including the government, by several million dollars. It unfortunately illustrates the difficulty in attempting to do government and commercial work in the same facility."

The suit claimed that Litton, using the same computer to account for its commercial and defense customers, had altered costs through a so-called "memory cap" that underrecorded computer usage and gave commercial customers discounts while overbilling the Pentagon. The practice occurred between 1981 and 1992, the government said.

Litton announced the settlement after the close of trading. In composite trading yesterday on the New York Stock Exchange, Litton's shares closed at \$36.50, up \$1.125, or \$2.2%.

MAY THE MIGHTY GE CAN'T STRIKE OUT

For street criminals, three strikes and they're out. For corporations, it's a whole different ballgame

[WASHING TON]

ED BY BILL CLINTON, THE CRIME FIGHTERS OF WASHINGTON HAVE HIT upon a wondrous new weapon for stomping on criminals: Three strikes and you're out. For anyone convicted of committing three

f violence, from armed robbery to rape and murder, the judicial remedy will be

as the place. Grumman, Mark and Teledyne have each had framewas the tempoyers.

GE has pumped out more than \$1300 million in fines and sertiements to group its various transgressions. Since 1984, the federal government has collected more than \$588 million under the Faire Claims. Act from corporations that tred to chine! On contracts and got caught; usually because a whistle-blower on the inside west public. How widespread is such crime? A 10-year survey by a George Washington University protessor found that two-thirds of the Fovene 300 were involved in one or more "significant illustrations." Seventy-five of the corporations were involved in five or more cases.

The three-strikes approach may be may see do much to frighten street hoodlama, but a similar approach to corporate crame would cartainly put the squeeze on remissive CEOs by hitting their bottom line. Ralph Nader has proposed that repeat offenders — companies that regularly defraud taxpayers — be banned from selling to the government for a fixed period of time. The same principle could be extended further to cover the inultitude of special tax breaks and subsidies made available to business: If you regularly break the law, you are not eligible to share in Uncic Sam's pork and gravy.

Let's not hold our breath waiting to set if this idea catches on in Washington. The same defense contractors who get naded so regularly for fraud are currently loubying. Congress to weaten the False Claims Act. complaining that it's unfair to them. The message is clear. Muggers who were suits should get an unlimited number of strikes.

rmanent. Lock 'em up for life: throw away the key.

Leave saids all the reasons why this probably won't deter violent time any more than the revival of the death penalty has discouraged amicides. The idea is so simple and direct — and so wildly popular that only the bravest politician will dare question it. At both the are and federal levels, the principle is going to be enacted into law. Meanwhile, there is another variety of repeat offender who slips om one florid crime to the next and yet never encounters the same and of angry reckoning. The crimes of these offenders are mainly nout money — stealing public money — but some of the offenses can uso endanger lives.

Let's name some of these recidivists: Bocing, General Electric, irumman, Honeywell, Hughes Aircraft, Litton Industries, Iagnavoz, Martin Marietta, McDonnell Douglas, Northrop, sytheon, Rockwell International, Teledyna, Tenas Instrumenta, Juited Technologies.

All of these corporations are major defense contractors, and all ave been caught defrauding the federal government in one way or nother. And all of these companies have been nailed at least three imes in recent veets. Typically, they pay a fine or negociate a seriement and promise not to do it again. The pattern of corporate rime is not restricted to defense contractors, of course, but they offer the most diamatic examples of a system that street criminals night reasonably describe as unequal justice.

GE seems almost in a criminal class by itself. At least, it gets nught more often than others. According to the Project on Jovernment Overnight (the folia who first spotlighted the 3600 toiet seats that the Peningon was buying in the '80s), GE has been evolved in 16 different episodes of lawiessness — everything from also billings and weapons-procurement fraud to money laundering and bribery. Hughes Aircraft has nine services against it, and it's still



BY WILLIAM GRE

Government sues GE over engine problem

Associated Press

CLEVELAND - The Justice Depertment is suing General Electric pertment is suing outpressing test results showing 7,000 military and commercial jet engines — including those on Air Force One - had dan-Brous electrical flaws.

The government is seeking at feast \$100 million in damages in the. hwsuit unsealed Thursday in federal court, The Plain Dealer reported

The Justice Department said the alleged flaws could cause fires or loss of power. No crashes were

mentioned in the suit.

GE, which builds the engines in suburban Cincinnati, denied the al-Regations — first leveled by a whis-He-blower - and said its engines

have the best safety and reliability record in the world.

"It is unconscionable to raise baseless allegations that could wrongly raise concerns in the public mind," GE spokesman George Jamison told The Associated Press.

The company said it told the Pentagon and Federal Aviation Administration of the whistle-blower's safety concerns in 1992.

General Electric, which competes with the East Hartford, Conn.-based jet engine builder Pratt & Whitney, has its corporate headquarters in Fairfield, Conn.

The allegations in the lawsuit involve a process that shields a jet plane's electrical components from microwave and radar transmis-

Please see GE, Page B2

GE sued on jet engine problems

Continued from Page B1

sions, radios and other devices that can interfere with engine operation.

These GE engines unnecessarily endanger the health and well-being of pilots, maintenance service personnel and passengers, including a very real likelihood of loss of life, the government said.

The lawsuit said Air Force One. the president's plane, "is also prone to an electrical system breakdown, engine malfunction, or worse, because of GE's fraud."

·Federal officials said the suspect jet engines power such military jets as the F-14 and F-16 fighters, the stealth bomber, the B-1 bomber and the AWACS reconnaissance plane. Commercial engines said to be susceptible to the defects are used on Boeing 747s and the European-built

An independent review of thousands of engine service reports filed with the FAA since 1990 by airline mechanics found no instances of electrical problems of the type described by the Justice Department, The Plain Dealer said.

Dick Williams, the president of Aviation Data Source in Denver, who conducted the computer search of FAA records, said, "Maybe it's not happening, or maybe it's something that is difficult to diag-

Feds sue GE over engine test results

By The Associated Press

General Electric Co. accusing it of appressing test results aboving 7,000 military and commercial jet engines - including those on Air Force One - had dangerous electrical flaws.

The government is seeking at least \$100 million in damages in the lawsuit unsealed Thursday in federal court. The Plain Dealer reported today. The Justice Department said the alleged flaws could cause fires or loss of power. No crashes were mentioned in the lewsuit.

Fairfield, Conn.-based GE, which builds the engines in suburban Cincinnati, denied the allegations which were first leveled by a whistle-blower - and said its engines have the best safety and reliability record in the world.

"It is unconscionable to raise baseless allegations that could wrongly raise concerns in the public mind, GE spokesman George Jamison told The Associated Press today.

The company said it told the Pentagon and Federal

concerns in 1992.

The allegations in the lawsuit involve a process that shields a jet plane's electrical components from microwave and radar transmissions, radios, and other devices that can interfere with engine operation.

These GE engines unnecessarily endanger the health and well-being of pilots, maintenance service personnel, and passengers, including a very real likelihood of loss of life," the government said.

The lawsuit said Air Force One, the president's. plane, "is also prone to an electrical system breakdown, engine malfunction, or worse, because of GE's fraud."

Federal officials said the suspect jet engines power such military jets as the F-14 and F-16 fighters, the stealth bomber, the B-1 bomber, and the AWACS reconnaissance plane. Commercial engines said to be susceptible to the defects are used on Boeing 747s and the Ewropean-built Airbus.

An independent review of thousands of engine service reports filed with the FAA since 1990 by airline mechanics found no instances of electrical problems of the type described by the Justice Depart-

Selling hardware overseas

A bribe investigation of General Electric raises difficult questions

n March 30. 1992, John F. Welch Jr., the chairman and chief executive officer of General Electric, received a disturbing letter in his Fairfield, Conn., office. The letter was sent by Zohair Hak, a GE technical director based in Cairo. GE was already under investigation for allegedly fixing

prices in the industrial-diamond market. Four months later, the company would agree to pay nearly \$70 million in fines for defrauding the Pentagon on sales of aircraft engines to Israel.

Hak's letter brought Welch more bad news. The engineer claimed that GE officials had paid hundreds of thousands of dollars in bribes to win a \$124.7 million contract with the Egyptian government for a sophisticated radar system. Welch ordered an investigation. The Department of Justice and Rep. John Dingell, a Michigan Democrat, are currently investigating the matter.

Making payments. From the evidence amassed to date, it looks as if Hak had certainly stumbled onto a problem. Hak said that the bribes had resulted from a \$2.75 million subcontract GE had signed with Universal Traders Co. (UNITRA), run by Aly Mansour, a former general in the

Egyptian Air Force. According to a report of GE's investigation into the bribe allegations. UNITRA spent \$485.000 to pay for the travel and living expenses of Egyptian military officers involved in awarding the radar contract. Mansour told GE that the officers were paid by UNITRA—not with GE money—at Egypt's request. The 133-page investiga-

tive report says GE "should have prevented" the payments.

U.S. News has obtained a copy of the report. In the document, GE's investigators state that Hak's allegations of bribes could not be substantiated; other Hak allegations, however, were confirmed. GE investigators found, for instance, that UNITRA had hired the chairman of the Egyptian negotiating team that approved the award of the GE con-

tract: the officer received \$64.700 from UNITRA between 1988 and 1992. Aly Mansour told GE the payments were not improper. He discussed the possibility of hiring the officer, he says, only after GE won the radar contract. Martin Marietta, which has since acquired the GE unit that won the Egyptian radar contract.

contracts. Some have caused problems. According to the U.S. General Accounting Office and the Detense Contract Audit Agency, Loral Aerospace International. a New York-based defense electronics company, paid UNITRA a \$1 million commission to help secure a 1988 military contract with Egypt, Such pay-



Allies. Presidents Clinton and Hosni Mubarak: Egypt buys billions of U.S. military supplies.

says it has taken corrective measures as a result of the UNITRA flap.

The case nevertheless illustrates the difficulty of policing sales of American military hardware overseas. GE had certified to both the American and Egyptian governments that it had paid no commissions to obtain the radar contract. But according to GE's own in-

vestigative report. "the services to be performed by UNITRA under its consulting agreement might render the payments to UNITRA a fee or commission."

GE knew of UNITRA's track record. The company has represented American and other corporations on nearly \$10 billion worth of Egyptian military

ments could be illegal: Loral says they were proper in this instance because the money came from corporate profits—not from government funds.

In the international arms bazaar, different rules often apply. In the GE case. company officials informed UNITRA that payment of travel or living expenses for the Egyptian military officers was illegal: GE. however, paid directly for more than \$19.000 in travel costs for the Egyptian officers. GE's investigators concluded that no payments of any kind should have been made to the Egyptian officers. "GE realizes that payments such as those discussed ... leave the payer vulnerable to accusations of bribes or gratuities and are, in any event, contrary to sound contracting procedures.



Welch. Troubled

BY DOUGLAS PASTERNAK

WINIZMS

GE whistleblower awarded \$13 million

milliony will receive \$13.4 million of all's Geneint flectile Ca. in sules in isincl's the guvernment to offeged fraud by the The man who sleeted

the United States," U.S. District Judge Carl \$59.5 million civil the. Rubbn said Felday in awarding the muncy. Chester Walsh "performed a service to

In Ices and \$221,514 in custs to Walsh's lawyers. (11? said it would appeal that part of Rubba alsa ordered (117 to pay \$2.4 million

in Israel from 1984 to 1989, could have Rubin's decision. \$14.8 million. At hearings last munth, U.S. icceived up to 25 percent of citts line, or Justice Department lawyers argued that Uniter federal law, Walsh, a (111 manager

1990, three years after he consulted lawyers. Israel log his part of the achemen hand a said in lawault that brought the charges to light until They noted that Walsh althis file the

feared far his life at the time. about the ulleged fraud. Walsh has said he

22.5 percent, or \$13.4 million. reduced Walsh's portlon of the settlement to Rubin serced with the government and

complaint ... and that his ellence facilitated aware of the fraud long before he filed his pethat of time," the judge wrote. the continuation of the fraud for some "The evidence does indicate that he was

not have had a case without Walsh's ussistance. But he ashled that the government would

guilty in July to fraud charges involving the diversion of \$40 million in \$1.5. milliony aid \$9.5 million celminal fine after pientling to Israci. Oll, bused in Fuhilicid, Conn. also paid a

Sichnifer, a OH manager, Dujan, la bi Juli bi as much as \$11 million was funneled into a englise and maintenance contracts. Instead, hilgadier Gen. Humi Dulan and Heibert personal fund controlled by Israell Ali Force The money was supposed to pay for Filld

Walsh is to be juild thee. 14

the slight reduction. said he was happy with the award, despite James Helmer, one of Walab's lawyers,

beacon for other chizens to come forward and prosecute fraud against the taspayers." "We believe his aider will serve as a

not be reached for connicut libbay evenlug The switchboard operator said no one was in A Justice Department spokesman could

suld in a statement littley that Walsh duesn't deserve the maney. The company the office. also said it would appeal the amount of the allurney's fees. (111; whilch isn't affected by Walsh's award

whillall in alloriney's fees," the company suspected found continues, in under to reap a their elients to delay repositing while reporting wrong doing while they watch their incentive for defense employees to delap honnity grow, and for attenticys to counsel "These two decisions escale a perverse

III Wind' Case Is Settled By Grumman

3y Joins Mines

Gramma Carp. is senting Justice Department singulates of improver familial temps by myong 520 mifers and gramma interal colonials limted oversigns of its comp programs.

The Long island-based mm's agreement to make the payment had been known previously, but not the government's monitoring of the emission programs.

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· Under the deat, Gramman must make permanent a program already in place that, among other things, things employed about ethind issued.

The settlement ends a three-year investigation of the firm one gust in the 'III Wine' probes of decrease for investigating and among instances of wrong-doing and among instances of wrong-doing and among in investigating to interview 40 employees. The firm also disciplined some employees, suppose deciling with some sumpliers and charges appearance rooms.

Former Grumma contrast John Officer was forced out of the firm in 1990 after the board of directors learned that he had secret franchities to the late James T. Name, a Long Island leabyest and Grumman contrac-

O'Brien pleaded quity to filing this personal han applications, and server outer people were commend in the matter.

The agreement between presentters and the firm default O'Brien's and Grumman's complex financial relationships with Kane, including \$600,000 in disguised loans Kane gave to O'Brien.

O'Brien, who was to recay only the interest, used the money to buy homes for his two children, and to \$875,000 tome for himself, the egreement tout

A Grimma vice president took 450,000 from Kine. Another had Kine help put her drughter frough college and had him treat \$400,000 in her husbann's construction from

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served Community vendors into minimizer or a Kana-controlled co-library across communities, intended for politicisms who promoted the firm

Some Common employees were given monerary quoins to be misefrom Common weedons for policiacompanies, the document said. Employees who referred to join in wemented with fring Grammon offcials also threatened to stop dombusiness with contractors who re friend to give money.

Lockheed Faces Possible Action By Air Force

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By Roy J. Harris Jr. And Thomas E. Ricks

Lockheed Corp. could face possible suspension from new Air Force contracts because of its indictment Wednesday, along with two former employees, on charges of making illegal foreign payments.

An Air Force spokeswoman said the service is "considering whether suspension or debarment is appropriate in this case." A decision on what to do, or if the service should take any action at all, isn't likely to be reached for several weeks, she Asaid.

Any suspension or other action could be saimed at either the nation's No. 2 defense contractor or a unit that was involved in the alleged wrongdoing. The business feited in the case is Lockheed Aeronautical Systems Co. in Marietta, Ga., which last year was responsible for SL8 billion of Lockheed's overall \$6.9 billion of new contracts.

Excellent Record'

Robert Gusman. Lockheed's assistant general counsel, said in an interview, however, that he didn't expect any suspension: or action barring Lockheed from competition. "Lockheed has an excellent record of integrity, so the prospect of suspension is very remote," he said. He said such a review by the Air Force is hormal in cases of an indictment, but that river the importance of Lockheed's programs to the Department of Defense," he would expect Lockheed to have a chance to Epresent its case before any action is Itaken.

Eachheed and two former executives, Allen R. Love and Suleiman A. Nassar, violated the Foreign Corrupt Practices Act and committed other offenses in making payments to Leila L. Takia. Ms. Takia. retained in the 1980s as a consultant in Egypt, was involved in helping Lockheed sell C-130 Hercules aircraft to Egypt, the grand jury charged, although she was a regovernment official at the time.

According to the indictment. Lockheed and the two former executives concealed payments being made to Ms. Takia, who was ineligible to receive consulting fees or commissions because of her position in the Egyptian partiament from 1987 to 1990. The payments allegedly related to Lockheed's sale of three C-130 cargo planes for 579 million.

Porteiting Commission

To hide the payments to her, including commissions of \$500,000 for each aircraft. an Egyptian company was set up that was to be run by her imsband, Abdelkerim Darwish, but accountly was under her control. the indictment said. Payments were made in \$3,000 increments to various Swiss banks, it was charged. The indicament also said that after U.S. investigators discovered improper payments, a letter was prepared in October 1989 "purportedly forfeiting their entire \$1.8 million commission." Three months later, however, Lockbeed began negotiating what the grand jury called a 51 million "termination fee" in lieu of her commission.

The indictment resulted from an investigation by the Defense Criminal Investigative Service with assistance from the Defense Contract Audit Agency, and authorities in Switzerland and Egypt. The case was handled by the U.S. attorney's office in Atlanta.

- In a statement, Lockheed said it "emphatically denies the allegations in the indictment and intends to vigorously defend itself against the charges." Mr. Love didn't return a phone call, and Mr. Nassar couldn't be located. Lockheed said Mr. Love had retired, and that Mr. Nassar was "no longer an employee."

Lockheed is also the producer of the F-16, the main Air Force fighter, and the next-generation F-22 fighter, along with numerous missile and space systems.

In the mid-1970s, Lockheed was among the major defense contractors tarred in a scandal over overseas bribes, eventually admitting to having made SSB million in questionable payments to win foreign business. The company then launched a major overhaul of its sales efforts abroad aimed at eliminating the kind of activity that had drawn it into controversy.

Says It Falsified Weapons Data

Plea Agreement Sets Fine. New Oversight Standard For Military Contractors

By ANDY PASTIOR

Staff Reporter of This Wall Strainer Journal,
A unit of British industrial grant Lucas
findanties PLC, admitting it falsified tests
of missile launchers sold to the U.S.
Air Force, agreed to pay \$12 million in
penalties and hire an outside ethics watchdog reporting directly to the Justice Department.

The criminal charge and plea agreement, filed yesterday in federal district court in Brooklyn, N.Y., set a new high-water mark for federal intervention to make sure that major military contractors abide by U.S. laws and regulations.

The court-mandated monitor, for example, will have broad power to conduct investigations, review past and present compilance efforts, become involved in personnel decisions and otherwise keep prosecutors informed about any suspected quality-control or ethical lapses. The new position amounts to a chief ethics officer for the unit who must be acceptable to, and who ultimately works for, the government.

While previous agreements have required outside directors to supervise such tasks, prosecutors said that the Lucas Aerospace Communications & Electronics substituting is the first large defense concern to give a court-ordered outsider effective control over its internal investigations and its compilance with criminal and civil laws.

The unit, based in Hopkinton, Mass., produces electronic equipment and missile launchers that came under scrutiny after some of them failed in the Persian Guif War.

But yesterday's move won't soive all of the British company's legal problems in this country. A separate criminal investigation of allegedly substandard aircraft parts Lucas manufactured for use on the Navy's F/A-18 jets is continuing, according to company and law-enforcement officials. Government agents conducted a search last year of facilities where Lucas manufactures so-called gearboxes that provide power to certain electronic equipment on F/A-18s.

The U.S. Attorney's office in Los Angeles, which is handling the gearbox inquiry, declined to comment. The gearboxes are considered critical safety items because they convert power from the F/A-18s engines to drive generators, fuel pumps and hydraulic systems. Industry and government officials familiar with that case said that prosecutors, among other things.

Please Turn to Page A6. Column 1

Lucas Unit Admits to Falsifying Data on Weapons Sold to Military

Continued From Page 43 want to determine whether potential defects in the Lucas-built equipment contributed to any F/A-18 accidents. Lucas is cooperating with the investigation.

Regardless of how the Los Angeles investigation turns out, the pies filed in Brooklyn sets a precedent for future settlements with contractors caught cheating the Pentagon.

Jonny Frank, a senior investigations counsel who handled the New York investigation, said the plea agreement is "a very large step forward" in applying in the defense arena some federal oversight techniques commonly used in organized-crime cases. "Rather than allow the company to investigate itself, it provides independent oversight... to make sure the corporation stays out of trouble," he said. The agreement is expected to become final next week after a court hearing.

Court documents filed by the government disclosed that between 1984 and 1991, about 4,400 classified devices, called launcher electronic units, were delivered to the Air Force without undergoing all required testing. According to court filings, workers and supervisors submitted fraudulent and sometimes forged certifica-

tions that the devices had passed rigorous vibration and extreme temperature tests. The investigation of the launchers was reported earlier this year.

The devices, used in firing Maverick air-to-ground missiles, first came under suspicion when many failed during the Persian Guif War. Company and prosecutors determined that the maifunctions weren't responsible for any "friendly-fire" casualties. But subsequent Air Porce inspections did turn up defective soldering, broken resistors and other deficiencies in some units, court filings said. The launchers were manufactured by operations of Lucas Aerospace that are based in Garden City, N.Y.

As part of the plea agreement, Lucas Aerospace agreed to pay a 54 million criminal fine, 57.5 million to inspect and repair launchers, and \$500,000 to reimburse U.S. investigation costs. Lucas said it aiready had launched "a series of monitoring and compliance measures to guard against any misconduct by its employees."

In addition to the firing units, the plea agreement covers false testing of certain Army radios in the fall of 1993 by another Lucas facility in Hazieton, Pa. Pentagon May Bar U.K.'s Lucas May Bar U.K.'s Lucas From Contracts

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Investigators Claim Parts It Made for U.S. Planes case engines.

By ANDY PASTICE

Staff Reporter of THE WALL STREET JOURNAL

The Pentagon has proposed barring Lucas Industries PLC from future contracts, citing investigators' claims that substandard aircraft parts from the British company pose serious safety hazards for military pilots, industry and federal officials said.

The expanding criminal investigation focuses on suspected false testing and chronic quality-control problems afflicting Lucas's aerospace operations in the U.S.

The Navy, which stopped accepting certain Lucas parts for its primary jets last summer and issued fleetwide notices highlighting potential safety problems, has told criminal investigators that 167 emergency landings of F/A-18 aircraft in the past year and a half are attributable to Lucas-supotled equipment.

A federal grand jury in Los Angeles is expected to begin hearing testimony about the matter shortly. While the existence of the investigation had been reported previously, the scope and details weren't

disclosed before.

The failures "have caused engine fires. aborted missions and were factors in the loss of aircraft." according to a confidential report sent last month by the Pentagon inspector general's office to each of the armed services.

In addition, Justice Department and Pentagon investigames were concerned enough to alert the Federal Aviation Administration about suspected faisified test data, alleged unauthorized repairs, and other problems they discovered in three searches since last summer at Lucas plants in California and Utah. The referral letter sent earlier this year to the FAA's Western regional office in Los Angeles. according to one person familiar with it, noted the widespread nature of the alleged

Please Turn to Page AS, Column 1

From Future Jobs

Deserve Deharminent

Continued From Page A2 improprieties and pointed to the use of suspected defective parts in gearboxes built for a number of military and commer-

The same Lucas unit producing gear-Pose Safety Hazards boxes for the F/A-18, the Nevy's main fighter plane, also make them for the F-16 that is the backbone of the Air Force's fighter arsenal, and for B-2 Stealth bombers and F-117 Stealth fighters. Lucas also recently won a contract to provide similar parts for use on McDonneil Deegias Corp.'s MD-80 jettiners.

Lucas's chairman, Sir Anthony Gill. met with top Navy legal officials yesterday to try to stave off administrative action. In Reston. Va., a Lucas spokesman confirmed the Navy's move to cut off all new military business, but he maintained that Lucas has 'no knowledge of a link in the investigation between our products and

the problems of the F-18s."

Bernard Carey, the spokesman, also said that company officials "have done their best to take remedial action to make the product right," including a "compietely new management team" at one plant, stepped-up internal compliance reviews and hiring outside consultants to conduct independent quality-control audits at all U.S. facilities. "We've obviously also had to keep our civil customers informed' about the inquiry, the spokesman said.

A decision by the Navy could take months. But in the meantime, criminal investigators will dig more deeply into the operations of Lucas Western Inc., based in

City of Industry, Calif.

The Lucas unit's Utah and California plants produce primarily military parts. including the gearboxes, which are used to convert engine power to run essential safety-related equipment on jet planes. On the twin-engine F/A-18, for example, Lucas-built gearboxes at each engine provide power to generators, fuel pumps and parts of the hydraulic system. Lucas is the sole source of the parts for the planes, and Navy officials are concerned that a prolonged investigation or suspension of deliveries could force them to idle many planes on aircraft-carrier decks.

Australia, Canada and other countries also purchased some of the roughly 3,000 of the so-called airframe mounted accessory drives for F/A-18s made over the years.

A Navy spokesman didn't have any immediate comment. The Los Angeles U.S. attorney's office and the Defense Criminal Investigative Service, which is participating in the investigation, also

declined to comment. The criminal inquiry comes on the heels of a 512 million guilty plea by another Lucas unit that admitted to faisifying tests of missile launchers sold to the Air Force and radios sold to the Army.

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and radios sold to the Army.

With 17 U.S. facilities currently doing about \$200 million of business annually with the Pentagon. Lucas has relied on acquisitions to increase its defense market share in this country. All of the units implicated in irregularities were purchased in the late 1980s. World-wide, 25% of the company's \$4-billion-plus in annual sales come from aerospace operations.

According to the Pentagon investigators' report, company officials "removed rejection tags from defective components" and then 'Yalsely marked quality-assurance logs" that the same parts were acceptable. Lucas also "may have conducted unauthorized repairs" without informing the government, the report indicates.

After tearing down dozens of gearboxes, investigators concluded that poor workmanship and allegedly substandard parts were responsible for many of the chipped gears, damaged bearings and metal shavings that often caused the parts to fail. The F/A-18 gearboxes "have a mean time between failure rate" of only about one-fifth of their design limit, according to the Pentagon report, and all 66 of the devices Lucas presented to the Pentagon for acceptance by the end of last month failed inspection.

- Jeff Cole contributed to this article.

Five Air Force Officials Boycott Probe Of C-17 Jet Cost Overrun

WASHINGTON (AP) — Five Air Force officials boyconed a House panel's bearing yeared by into \$1.5 billion in cost overture and other problems with the C-17 cargo jet. The chairman threatened to force them to testify.

"Despite ... extraordizary efforts to senire cooperation from the department there has been no change in their position." Rep. John Conyers, D-Mich., mid the House Government Operations subcommittee.

At the hearing, Sen Charles Grassley, R-lowe, said he has moved to block the recommended promotion of one of three generals involved, and urged supped-up efforts to determine whether unwarranted payments to the C-17 contractor amounted to violations of criminal law.

And Derek Vander Schaal. Defease
Department deputy inspector general,
reviewed the tangled troubles of the
McDonneil Douglas cargo jet, ranging
from a quality control controversy over
given to ballooming casts.

The panel was also treated to a video showing a stress test in which a C-17 wing crunched under pressure lower than called for by specifications.

Convers told the hearing that the Pennagon had refused to order five officials connected with the C-17 program to tentily before his succommittee on legislation and national security.

"I believe their testimony is nessed to complete the subcommittee's investigation." Convert said.

The officials are Michael 3. Donely, existant secretary of the Air Force for financial management and Elemor Specior, director of defense procurement, as well as three officers involved in the C-17 program. Lt. Gen. Edward

P. Barry, Maj. Gen. Michael Burchko and Maj. Gen. John M. Nauseni. 2000

An inspector general's report has recommended discipline for some of those involved in the C-17 program, and Conyers said the Pentagon told him Tuesday that under the circumstances it would be unfair to form the five to testify.

Convers also quoted Penagon officials as saying their own review of the case, the to be completed act month, should be allowed to proceed without the pressures of a congressional hearing.

Conyers said a pending departmental investigation was no excuse for holding up House hearings and added that the subcommittee would meet next week to consider issuing subpoents that would force the five to testify.

Lawmakers took the opportunity to went frustration at the program, with Grassley crossing the Capitol from the Senate for the bearing. He said the promotion of Nauseri to lieutenant general was recommended to the Senate on Jan. 20 but that he has asked the Armed Services Committee to hold it un.

"It defies all reason and understanding." Greatey said.

"Has fraud been committed in any of the C-17 contracts?" the lowe senator asked. "If so, this must be handled in the proper manner."

The facts suggest that criminal laws may have been violated." he said.

Vancer School said that "this question of emminaitry came up ... late in this process." He stopped short of a direct opinion, but did say that "several individuals engaged in highly improper action."

Agreement will settle government complaint

By MARK PAZNIOKAS Courant Staff Writer

Raymond Engineering Inc. of Middletown has agreed to pay the U.S. government \$765,993 to settle a complaint that the company overcharged for a component used in the U.S. Army's \$3 billion Patriot missile program.

"U.S. Attorney Christopher F. Droney announced Thursday the Civil settlement with Raymond, which is a division of Kaman Diversified Technologies of Bloomfield. Kaman is one of the nation's 100 largest defense contractors

largest defense contractors.

"Kaman admitted no wrongdoing in agreeing to the settlement. A spokesman said the settlement was cheaper than risking a lawsuit by the government. "These things can get really expensive with attorney's fees," said Ken Nasshan, the

spokesman.

The government said Raymond railed to disclose pricing data to the prime contractor, Raytheon Co. of Bedford, Mass., which led to Raytheon passing on overstated costs to the Army.

Raymond paid the government: \$62,000 to settle a similar complaint in November 1992, also involving the Patriot missile. Raymond paid \$265,000 in October 1993 for failing to disclose pricing data on a Navy contract, the government said.

Federal law requires contractors to disclose their most complete and current pricing data when negotiating contracts.

Nasshan said the company disclosed information consistent with defense industry practices.

"It really was a technicality," he said of the latest settlement.

Teledyne to Pay \$112.5 Million To Settle Suits

Accord Appears to Resolve Two U.S. Fraud Cases: First-Period Charge Set

BY ANDY PASSION

LOS ANGELES — Teledyne inc. agreed to pay a total of \$112.5 million to resolve two long-standing whistle-blower suits alleging fraud and improper testing of electronic parts it sold to the Pentagon through the 1980s.

The tentative agreement, which had been expected for months but remains subject to final court approval, will turn out to be among the handful of largest civil fraud settlements involving military contractors. Despite the considerable financial drain on Teledyne, in many ways yesterday's announcement represented relatively good news for the company.

Settlement discussions, for example, have involved amounts significantly larger than \$112 million. The company also managed to avoid the risks and potential embarrassment of going to trial. The espreement marked the culmination of a concerted effort by Teledyne to resolve management's attention, drained remanagement's attention, drained remanagement's attention, drained remanagement's attention, drained remanagement's attention.

Teledyne previously pleaded guilty in making false statements to the Pentagon and paid \$17.5 million to settle related acciminal charges. The settlement announcement came after the close of regular trading. In composite New York Stock Exchange trading yesterday, Teledyne shares fell \$2.5 cents, or 4%, to \$14.775.

(2 The Los Angeles-based maker of defense electronics, consumer products and specialty metals took a charge for the full amount of the proposed settlement against earnings for the first quarter, though the agreement calls for some of the payments to be stretched out over the next year. For the quarter ended March 31, Teledyne reported a loss of \$55.1 million, or 99 cents a share, compared with a loss of \$155.5 million, or \$2.31 cents a share, in the year-ago period.

Donald Rice, the company's president and chief operating officer, called the agreement "an important milestone, which certainly ought to allow us to focus more attention on running the business."

is Since 1989. Teledyne has been the focus of no fewer than eight separate federal criminal investigations and at least that many civil probes. As previously reported, the Justice Department had joined both of the whistle-blower suits that were resolved

As part of the settlement package.

Teledyne Inc. Agrees. To Pay \$112.5 Million To Settle Two Suits

to settle a 1989 civil case alleging that its Systems division kept a double set of books, and padded costs on government commants by showing federal auditors phony files.

- Teledyne also agreed to pay an additional SSS million to settle a 1990 suit that the company's Relays division failed to properly test switches sold to the Penta-

Three months ago, when Teledyne suspended its cash dividend for the first time ever, there was speculation that a settlement was close. In fillings with the Securities and Exchange Commission over the years, the company asserted that it didn't have reliable estimates of potential damages and therefore wasn't able to set aside funds to pay anticipated settlement costs.

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UTC, whistleblower settle lawsuit

and Journal bujulear Stall The Associated Pross

tawault with a former employee who claimed the company demoted that for refusing to lictats to win helicopter sales, according to a participate in a scheme to bribe Saudi ofpublished report. United Technologies Corp. has settled a

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SOUTECS. settlement involved any east payment. but ucliber he not blichael I bluellet. Tuesday only that the case was dismissed, Diviley's lawyer, would illicture whether the 313 spokesman kintt Norrollo sald

craft division, had asked for \$130 million in headed by Rep. John Dingell, D-Mich, have leader Saddam stussent would my damages in the lawsuit, which was filed in been tooting into Dooley sitegations.

11.3. District Court in Washington bi:Octo-(11:3 Justico Department officials could not be higher vigorously dented any wrongdoing 11.3. the for UTC's Stratford based Sibursky Ali-Douley, a Middle first sales representa-

along with the bullery scheme, in which he clutioned 13 companies and eight individuals were hiresteed Douley suld be was threatened and then

U.S. export restrictions and to deceive Consplied with the Sandi toyal family to shirt gress to sell helicapters. He contended that UTC officials con-

sules. He said payoff money was passed tracts for services to support helicopter as commissions, consulting fees, and conpolinees. through a Saudi businessman to two Saudi The lawsuit suld the billies were disguised

. the company's law firm found the allegations "without meil." spokesman, said an internal investigation by At the time, Musty Masse, also a UIC

W. O. C. Brand geneticals for comment & And : Peter D.H. fat the time. was headed by Rep. John Dingell, D. Mich., have leader Saddum Husseln build up his was gressional investigations subcommittee The Justice Department and a con-

the settlement will have out the pube. subcommittee, said h's unclear what effect Stockton, a research analyst for thingel's

their law firm," Stockton said. sculed, you lose your whistleblower and "A ful of thuce when these things are

Siknesky and his British partner had toled to coude U.S. espoit laws. ucen a lung series of legal altimbhes uver other issues. Late last year, Dunley clabued Since Dualcy filed his lawsult, there has

cylicines that the company and its illithat partner tited to sell helleapters to from hi the years before the 1991 Perstan Chill Wat. jet engines for thochig 747s to host of hou painer, Westland Oroup ple, applied to the They also claimed Sikursky and its fielish lillsh gavernment to sell Plait & Whitney Dooley and his lawyers said they had

sales "helped (or attempted to belp) tout Documents filed in court said that the

20 years after they struck their deal, did this special student keep his end?

Connocticut Living, B1

A teacher's bargain

BY MIRANDA S. SPIVACS

SEE ROBERT WEISMAN FOU SLAT WATER

PAGE

WASHINGTON - United Technologies Corp. which has stendfastly denied any wrongdo-ing in the III Wind probe of Pentaton beatement is moning the next few veers to criminal the next few veers veers

charges stemming from the live-year fraud investigation.

If the piez agreement goes through, it would remove a cloud over the Hartford-based defense contractor — the nation's sev-ent-largest — as it attempts to font off at least two other investipations of its desitors for defense MUSCL.

But a decision by UTC execu-tives to enter 1 guilty pies after they have proclaimed for years that the company has done no wrong in the Pentagon procure ment scandal calls into damenou the company's cresibility, some

Company officials refused to onfirm Monday that a plea barpain was in the works, Joseph J.

gain was in the works. Joseph J. Aronica, the (ederal prosecutor residing the investigation in Alexandria, Va. 180 refused to comment Monday on III Wind.

But sources close to the investigation confirmed that UTC has been negotiating with Aronica and is close to an agreement on a nies. They said it might come ples. They said it might come later this month or early in August. The Wall Street Journal reported Monday that the company would be fined 12 million for criminal wrongdoing.

Rumors have circulated for weeks that UTC was negotiating with prosecutors to limit liability.

with prosecutors to limit liability to the corporation rather than to any individuals. There also has been specialized that the compamugnt enter a guily plea to

Please see UTC

Tuesday, July 14, 1992

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ALANA CI N. Namber 196

Weather Cloudy, High in 80s Dutalls, D10

TC expected to plead guilty to fraud charges in federal case

A CUBITACIA. le julogicalisa about govern. colleges elicials in teluca for e charges that belbet were paid

losal for the fift engine on this about strat General Electric'u itubave seceived inside informa. ITC's Prail & Whitney division in y's F/A-18 jet lighter.

the solution in the case that could be h wither coliminal and civil penalurate, would be pality compared he reported 11 million flac. W he traud lavestigation, and it that already have been assessed a slap on the hand for United Tech-nologies." Bush said. "There's caough concern in this country that white collar criminals go unpun-lated, and here they appear to be doing it again."

Nicholas lleymana, analyst for County Nat West USA, an investment firm in New York, said he had expected UTC would wind up paying a line of at least \$13 million.

That's not much by today's stanthe list out. lion figure ."Il's like a dad telling his

mining from the lil Wlad lavesit citic agreed to pay \$180 million telle coloninal and civilischarges isy's, another mojor defente conut example, la September 1991.

one possible explanation for the

Scalor UTC executives have for pestedly fuld employees and the intenents that they "believe that no UTC employee hoowingly re-ceived states information" from for public in company letters and ether vyn A Paisley, a bey ligure in the mer Navy assistant secretary hiel

(iE at that point was so far abred

uld not catch up technologically

tingine development that Pratt

ectuen to the government.

ary's business

culter to what larger share of the ie contracts to make a competiution it obtained about GE's enall never was able to use the lulor. ver reported time for UTC is that

1931 to several charges, including turning over to a Prait official in April 1987 government information investigation. Paisley pleaded guilty in June

as negotiating a guilty plea, but by spined not by the reposition UTC there appear to be no lillely profile

other recent gultty pleas in defense the reported 32 million ligure, which they said was low compared with

undersalue the credibility of govern-nical prosecutors, as well as UTC. Defense Information to Washington, said the reported settlement could associate director of the Center for Restred Navy Capt. James Bush,

.. The ee cultiling dollars sounds like

ght by the Justice Department.

'III Wind' at a glance

The Justice Department investigation into weapons buying fraud and butery was made public June 14, 1888, when tederal agents raided 31 theory was made public June 14, 1888, when tederal agents raided 31 this raidenwide. Here is what the probe has challed up, not including the raidenwide.

tains, nine government officials and 6 corporations. Convictions: 56 convictions include 28 corporate executives, 13 consul-Unhad Tactmologies Corp.'s reported plas agreement:

Fires, \$225 million in projected tines, modified contracts and recovered

Connecticut connections flashed were East Harriford-based Pratt & Whitney's critics to Washington, D.C., and these of Norwalk-based Mordan Systems' shas in Connecticut. Evidences 44 search warrants producing 250,000 documents more Bian 500 subposnas Issued.

SOURCE: Assussed & Any Joseph Asomes, Absundits, Va

In states of Course

et this point — their restructuring

He was releveled to the company

val GE's proposal for the Fiel enthat he had obtained concerning the

formally named, but he has been them the hilled by several sources as Eucould not be reached blonday. gene Tallia, bead of Prait's Washingclined comment in the past, and be The Prais official has never been , bearly 16,000 jobs worldwide and the billion a year in operating costs by

guld decade.

be as relieved by the expected out-25 cents blunday at 151 50 a share on Heymann sald Wall Street would

the New York Stock Exchange.

"It will be good to have it behind them." Heymann said. "It will be alce for their top management not to have to worry about this. It clears what the company needs to focus on the sir so they can concentrate on

cases, people cluse to the investiga-

dulag has civil jawauli by a Siboraky employee charging that company of the Saudi ficials belief members of the Saudi lice Deportment and congressional investigation of charges that Pauli officials had made Wick payments pled wrong dolug in a coulinaing Juscontracts The company also has dejuling munarchy to obtain helicopter UIC afficials bave deuted wrong. erce englas contenct.

On July 3. Benjamin Somenschein, a Fair Lawn, 11 3. buchessman, pleaded gulliy in a Brooklyn
lederal court to criminal charges
that two companies he owned acted on litted Air Force general who is now serving a jail sendence in litted for taking better from American doos a go between through which Prais univeled 16 inilian to an associate of ense companies, tacheding GK.

about the role of individuals, if would end legal pressure on execu-fives such as Robert F. Daniell, pres-Although a plea agreement does chief execultve officer am GE is said to be ready to sign a pice ogreened with the Justice Department and pay a 170 million fine to settle early at the side of E million and bound for livel and brilled the general, stand Dulan.

ing Italitey Part of the plea agree. board chairman, who approved hir-UTC in the IN Which investigation fullows guilty pleas by several oth-ers associated with the company.

judividuals be charged.

appears to stipulate that

becement with presecutors in ill Whid after four years of dealers from UTC, could cast doubt on chilis by UTC allicials in two other The decision to negotiate a plea ises in milliory radar, also have been convicted or pleaded gully. sive to Hurwall. Com. that special Officials of Nanden: a UTC divi

scribed as a bey sigure, was contact and in 1930 by a federal jury of conspiracy, believely and interestate Mulduon, who investigators de official, to bely a California compa commerce violations for paying lack B. Sherman, a Marine Cura

py compete for a battletteld common pleations system. He was sendenced to 27 months in pition.

William M. Calvia pleaded guilly
'in 1996 to charges that he had in the Patitley and a locates deputy analy. included Prail and Hurden Paintey iani Ale Porce Secretary to win Pen-lagon contracts for his chepis, which partners after Paisbay bell the Havy

Janus Hiphane, a scalar which president of business development at the charge product guilly in 1968 to charges of compliancy to defind the Break property. He was searched to sta analoks in a hallway bours and thank 13.000.

Hoger K. Eaget, Number vice pres-tions to advanced programs, plead ad guilty in 1990 to constitutely is consected of a probable to a believe defraud the government and their of bouse and thurd 15.000

und manager, pleaded guilty in 1988 meat properly and was scalenced to three months in a battery bouse. the government and their of govern-C.J. Michardson Horden buturess

nilable in stores for about \$11. vy charged \$544 for connector

Hud Press Writer HIN DIAMOND

ssance aircraft. ers and toilet seats, a son's book of high-priced . In a new page in the park plug connector avail-SILINGTON le price gouging by local hardware stores for charged the Navy \$544. panel of an unmanned is investigating A con.

Pioneer UAV Inc. of Ilunt Val-

ground troops. connaissance videotape of if Unmanned Aerial Veon the motor of the Navy's fronts for Marines and a drone aircraft used to spark plug connector

> overbilling for spare parts.
> The committee probe turned up what appears to be egregious vices investigations subcommi overpricing by the contractor, Three Navy whistleblowers, fusirated by their own subcribus, alerted the House Armed Ser

\$544 for the part. Instead, both the Navy and the subcomconnector was included the price quoted by the componing the hulividual part is \$544. vestigator confirmed Friday that parts package priced at 525,000. http://doi.org/10.1000/10.1000/10.1000/10.1000/10.1000/10.1000/10.1000/10. militee that the Navy never paid lcy, Md. Pioncer UAV has argued to

BUSINESS

Whistleblower needs money, lawyer says

By The Associated Press

a whistleblower lawsuit. Reeth was high on the corporate ladder of United Technologies Corp. when he risked it all by filing HARTFORD --Douglus D.

\$22.5 million, under a settlement announced Wednesday, for reportfor work before it was done. improperly billed the government ing that UTC's Sikorsky division whisileblower will get a record The executive-turned-

corporate job are probably "nil." Goldb of Stamford. Goldb said cording to his attorney, David Keeth will need the money, ac-

\$150 million to settle the governafter UTC agreed to pay a record ment's claims. Recth didn't have much to say

nounced. just after the settlement was unlame, and mine is no comment," he said when contacted by phone "Everybody gets 15 minutes of

as UTC's vice president of finance

ciple when he blew the whistle. Golub said Keeth acted on prin-

pany who, risked his career to do inhuwsuit said. ployee, who was turning on his "This was not a disgruntled em-

ceive anything." didn't know whether he would retime he filed his lawsuit, Mr. Keeth the right thing. Remember, at the

whistleblower has made bijn a since he filed the suit. he has been unable to lind work varial in the corporate community; Golub said Keeth's status as a

college-age children, was heading .Keene, N.11, with his wife and two Keeth, 46, who now lives to an internal audit of Sikorsky's billthe lawsuit. ing practices in 1988, when he filed

V for helicopter work at its Strate Officensen Strotisky Africal division, going back its lar as 1982 Reeth accused company officials of the firmly because of the conceal defails of the knowingly and traddulently billed the lederal government premainte-The action alleged that UTC

to the practice in a report in March stence to the problem and agreed to investigate. He alleged the com-Cains over his objections.

Keeth alerted company officials improper billing practices from the Department of Delense after the company had disclosed the ex-

· 1989, but was told that all copies of the report must be destroyed, the lawsuit said. A month later, he was

1978, was faced with a choice: he president's job, or he could speak taking a job with the company in steadily advanced at UTC since Golub said Keeth, who

prematurely, said U.S. Afformery Christopher Druncy. from 1982 to the present on paymillion compensates the governwith the government. The \$150 UTC did not admit to any trandulent intent in the settlement

ceived more money in total than ernment, said Assistant Attorney General Frank W. Hunger, head of interest-free boans from the govinflated payments constituted permitted under its contracts, the Although the company never to he Justice Department's

ment that Sikorsky had erroncousadjustments. The company then than \$80 million to the Pentagon in ings, and began its own investigavoluntarily disclosed to the govern-1988 through refunds and billing WIC voluntarily returned more y calculated progress payment bill

employer for money." Golub suid, told to turn over all copies of the has been reached, Keeth is plant. This was a rising star in the com- report to company lawyers, the hing to "sh down and make some lecisions" about his future. Golub said now that a settlement

Whistleblower reaps \$22.5 million as UTC settles suit

by MARK PAZNIOKAS

and MICIAEL REMEZ

delians that its Shoreby Aircraft DiThe eward is the length of the length

the are identified the legal errive are identified that the who is the Cird War that grands either who is the control of the uncover itend with a perion of the UfC money they see the perional his filed the haster beparented sid food the haster beparented sid and the desire began and the period of the circ of the control of the circ of the control of the circ of the circ of the control of the circ of

UTC unexpectedly made the deal termidedies.

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mapsay had decovered terrest. Density and the pererminent of

The civil lilipation Krein liablated brothling to the generation of the process o

terify diclosed the high Tourisplies and inscribe to government the ambienty dictioners and by UTC Rock's second. The best of the ambient will be the ambient of the ambien

Tronge VIC PG AL

IF T TEIG (A20 IN MAINCES COMMAND Burnder, frank 31, 1891 UTC settles suit; pays U.S. \$150 million

UTC gave the government built of the statement falcased long that distributed the statement falcased long that distributed the statement falcased long that distributed the statement falcased to the st "Is an that then conducted an auter had here "of provided to the had been "of provided to All disclosure to the government."

"Which he brought the lawyak, the risk was he get outling and be has no career." Golub sald. "He had to make a decision as to whether he brould go to the mat, and he did ever a mail or of considerce."

Calved prematurity.

Llader precedure acultaced in the whilelebowing love. Densoy said, in the whilelebow or seen the competing and the greenment price in preservation of case.

Oreasy said seems of the territical patien was dense in Consension but haute Organization in Washing the angulated the said area! The department is had externey was build factor.

The law under which which beautiful can collect meany dates in the Code Wir. Goods and 8 items from this property of "meanwhim" that which control during battle, cantidated by the transaction of the collection of the collection

Pratt aided overpricing scheme, report says

UTC head says firm had unwitting role in Israelis' diversions

ly dylina all tallians of dulies in 11 S. defeate maney in the late 1980s, sungressional investigators the losed investigators the losed investigators. Prott & Whitney allkitote helped menthers witness to ske farce thegat

And skhough a sepost by the General Accounting Office copy there is no proof that these in charge of the East Hardurd based

jet-engine mehes hnew of the siver-plans. It says the company should

to Congress by lavestlyators from the OAD engices that From JO. close played a role in on averywhing achience orthestead by furnier have ligured it out. breelled force lief Gen benefibe

"We found that between 1986 and 1981, Prott & Whitney and Insell blinderry and between officials

helped tirsell Air Force officials and where to divert U.S. foreign milliony oscillance hands and circumstate cettain program sesuite tions," the deall document exp.

Profit and his present company. B. United Technologies Corp. have ancholostic diseased that Profit The evidence is to be presented juday of a hearing before the House subscummittee on aversight and inverilgallum, braded by US. Rep. John D. Dingell, D Mich.

did not knowingly winder only have on previous to the first that it is not that i Rider f. Dielett, chaleman and

cidel eseculve white of USC. Is scheduled to present the tempony's justified to be and

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Pratt helped Israelis siphon defense funds, report says

eshinease, a process the sepost says seller too bearly on the secessing country's efforts to refegues 4 15 The GAO report to the cellical of Peningan average of the celling to the S. defense cumunitan ta farelga gur

ment fisud

'Out inquiry found that no Field possibiliposa in a deception construd an lively fall for delense procurs. le now ecoving a lib year sentence in that triets was an unwhising

A Whitney caplayer deliberately at handingly eloisted company pulled of government films. Hince, it is clear the tenope that pro-

coluers were and adequate to one particular kind of streumstance; tubeonitacing with a customer directed source.

in most cases, the diversions to-valved Datan's directing Frost to five subcommenting work — as to-fined prices — to componies that wind believes at at the Lean.

them beiney bunkierrinnan, Benja-mia Somiearchela, of the direction of a Poton orroctore, Yoram lugidi. the - Busice the and Ale Tech ples - Virgico lise and Ale Tech By the time Daton was errested to 1996, Frost had poid \$6.5 million to two Computer to design computer programs valued at about \$600,000.

relative of ingula's with no background in computer work, pleaded
guilty in a tederal court in Brooklyn,
if W., to estandard charges that the
two companies acred as gobetween through which Front fun peled willian to the insells.

the street was the property of the street of the question dos been whether forwarded the computer programs that The report alleger that Peatl

firm - at the direction of the brack to enotice example, frett con-

American throughtered to duthe eathe job for \$1.3 million, but Pratt
gove the break throne \$1.35 million
control for part of the work and
gove a \$10 million control to the
American company — bendia faghre Cuntral Systems — for the rest

That draws up the price for the culter project by \$1 addition, from \$1 and the price of \$2 addition, the report easy. And Bende had to help fright beginnering with the

ony wrong doing to its dealings with Duran or lingbile. Prott has ned been thouged with

Electric, trait's main strat a siglie estes, pleaded

agreed to pay a 180 million Ano. The company laced much of the bidges on a single engaloge.

In July. Bingell's committee hand feel to the bidge to the bidge to the bidge to the bidge.

With the children Welch and placed in century of the published to the bidge to the bidge. ougress los bis compiny a sula la

a commission that auggent that field Taday, thankell be expected to face questions on the expense and depth of face is a face at a state.

Frain and WIC afficials bave on socialities, must have realized ave toben alege so enjoin the grab profited from he dealings with libe unithing was wrong and could choos to Ignues these in o dividiban scheme finde

countered that Free had that shoke when directedly the breed to glad week to certain subsention to give work to certain subsunts to the And they say questions cale with Doing or other tracells we ported with stolements about to

tred une shegitten that Frat and the chart handle gly shifted to death falled to been proper secuels.

Abbresh all to the edons press

Hoches Persuand Front & Way

Sikorsky faces flak on helicopter sales

By BIIBANDA S. SPIVACK
Courant Stad! Writer

WASHINGTON — A former executive of a firstish amonitous company has charged that Shorthy Alternative of a first that the craft executives falled to tell the U.S. government that Shorthy and a British partner were acting armed belicoptera to Saudi Arabia, to a potential violation of U.S. export law.

James anace hallowers by control of a federal could deposition, he proved true, it also could strengthen claims made by a cueffine Shorthy army feder—Thuman F. Duoley—that top efficiate of Shurshy and others were bavolved in a beliery echeme to adding a helicopter contract with the Saudis and to arm the helicopters in a may that circumvented U.S. arms export control

Sitorshy President Gene Buckley and has inflared with 12st week that he had no knowledge of the assertions

by James, eaclime beed of Asir lifeling in British. Asirs had bustness the with Siberaby's British
partner, Westland, abelicupter counpany.

Duckley predicted, bowever, that a lawsum brough by Dooley against Bhorshy mould be resolved in lavor of the company and its curporale parent, listlined based United Technologies Cosp.

pooley claims to that suit that he was demoted and punished after going to his aspertary with claims that Silverby was engaged in a bribery scheme. Because of its panoply of claims of netarious dealings in the hiddle Eastern arms trade, the law-suit has caught the attention of congressional investigators and Justice Pepartment officials. Federal authorities are conducting parallel probes of allegations that UTC and shorter by sinuage other defendants, agreed to pay substantial bribes to

Please see Siberaby, Page At . ;;

corsky faces more flak in charges on helicopter sales

told towyers that Buchley and UTCs at, lawyers for the body and the finite state of the body and the finite state of the body and the finite state of the body and the state of the state o

and postly the US government.
That assertion could be used by Douley to claim that UFC officials abowed by their activities that they were engaged in deliberate acts that were part of the groundwork for the alteged bribery scheme involving nacenhers of the Saudi government

and ruling family.

Withholding such tolormation in
deflauce of federal has could be seen
as elements of a compleacy, flower-

upters could be found to lon of US export have and y substantial penalties.

Linns also could spark a loversity allow by federal reservant spur political repertue Congress, whose intentice US arins selectables on tille in US. Disposition on tille in US.

bave indicated throughout preirial proceedings that company officials adding that company officials adding the first the U.S. government, and would have made the necessary statements to U.S. agencies U.S. agencie

I'aul could not be reached, but blarty bloore, a UTC spubesman la Harrford, said, "As we have stated repeatedly, we don't believe there is any medit to the altegations raised in the tawsuit."

Lawyers for UFC and Westland attempted to debunk James's credi-

billy during the deposition, and tried to portray blin as a diagramited former executive who was lighting with his prior employer, hairs, about compensation.

James acknowledged in aword feathmony that he thought he and other former Asira managers were being labeled acapegosts in the collapse of the company. The lawyers also got James to acknowledge that he believes the company still owes him mousey, but James said the company was in receivership, so the claim was probably moot.

The Dauley case, still moults away from teld, has cought the alteration of they, John H. Dingell, D. Mich, as well as the Justice Department and the FBI. Diapell's investigations subcommittee in conducting an inquiry tota dealings of another UTC unit, trait & Whilacy, and the selectionable with hand De-

tan, a former lareell milliony ufficer who was convicted in a bickback and payuff scheme.

Dingell held one bearing on the butan offsit and bulan's involve mean with General Electric, which paid \$16 million he aboral files and pensilles he connection with that company's rule in the ocheme ife to especied to hold a hearing on he bulan. Frail relationship easily nest year 8 celeral prosecution also have been examining the ties terrered by an and Frail, but there is no timete. The for completion of that protes

Sikorsky šale ro Saudis

John January Continued of a Birlian main in heisengues in a lawy find crease of a Birlian main is heisengues in a lawy find crease of and a British partnershoot armony the company of Sikorsky and UTC believes in Sauch Arabia yellout in the Sauch Arabia y He with Sikonky's Brittle-outlier sea-Churs could lead to a crimiffal myestiga Product would lead to a criminal investigation of products. Which oversees U.S. arms. The abroad.

This could strengthen allegations in the company filed by Thins trader. Dooley alleges that some E Zirouski executives were revolved in 1. bilibery sememe to obtain '& helicopter Econumic with the Saudis and in arm the

See SIKORSKY, next page a

He also said he did not believe any armed belieppted would be sold to the Saudis without U.S. approval.

Buelder

Buckley said he had no mowiedge of James' daims. He also predicted! Dooley's lawsuit would be resolved in favor of UTC and Stratford-based Sikorsky.

In his lawruit Dooley contends

that he was demoted and punished after going to his superiors with allegations that Sikotsky was en-

Federal authorities are in-vestigating the allegations, and U.S. Republish D. Dingell. D-Mich plans to hold hearings on Dooley's claims.

UTC head says firm had unwitting role in Israelis' diversions Pratt aided overpricing scheme, report says

ly siphon oil millions of dollars in Prail & Whiney officials helped premibers of inract and force liegal 1980s, confectional diverifators

there is no proof that these in there is no proof that these in the East Heatfurd based discioned Tuesday. And although a report by the

sions. It says the company should have figured it out.

chie played a role be an uverpricing theme orchestrated by furmer the OAD suggests that Peatt off. to Congress by lavestigators from breelt ple fuece fielg Gen fraut Du-

"We found that between 1986 and 1981. Prott & Whitney and Israell Ministry of Defense officials

Testimony to be delivered today beloed breet Air Force officials and where to divert US foreign sullivery assistance hade and cirtions." the draft document says.

The evidence is to be precented today of a hearing before the House subcummittee on oversight and in John D. Dingell, D. blich.

Pratt and its passed company, united Technologies Corp. have mahntained sicodiastly that Pratt,

aid not knowingly violate any laws on procurement regulations. The large March common has and the March has have the March has been the law or and sherted U.S. office of the found and sherted U.S. Rubert f. Dankell, chaleman and

Energy subcummittee today. chiel esecutive affices of Dic. echeduled to present the evenyany

Please see Plate Page Ale

Pratt helped Israelis siphon defense funds, report says

The GAO report is also critical of Peniagon overlight of sales by U.S. defende consistent to foreign gov. country's ellust to saleguard il S einments, a process the report toys in prepared tentamony, Daniell eyes hered pelices — to componies that hered pelices — to componies that here associated with Dolan. alved Dutan's directing Pratt to In most cases, the diversions in-

became the best of the defense procure participant in a deception contitred by Dotan and his associates Dotan Our inquiry found that no Frett By the time Doton was arrested in 1990, Pract had paid §6.3 million to two companies in design computer programs valued as about \$600,000, according to the GAO. The companies — Vireico Inc. and Ali Tech win Someonchela, at the direction of a Potan associate, Yoram logist inc. - had been incorporated by a tew Jessey bushessinian, Benja

positioner blad of discussioners in the customer discussioners with a customer discussioners. ground in computer work, pleaded pully in a federal court in Brobbyn, IV, to estimate there as the live composite acted as fobeiweens through which frost funneted militaris to the Israella.

The question has been whether ing them "In return, Fratt & White ney seceived a 45 percent mothup un each subcuntted," investigaturs forwarded the computer programs tun. The sepost alleges that Pratt

then - state direction of the breefing known as pump modules. An In another example, l'east con-

& Whitney coplayer della basewingly violated

ment fired.

American firm offered to do the en-ilie job for \$1.2 million, but Proti give the brivell firm a \$1.35 million contract for part of the work and give a \$30 million contract to the American company — Bendin fa-give Control Systems — for the rest

that drave up the price too the entire project by \$1 million, from \$4.2 million, to just over 15.2 million. help light Englaceting with the

butan or linguist. From hos not been charged with

ummier. Falifield based cingline sales, pleaded is District Court in Cin-compiliting with Doton in ectife, trail's main itea

a morey toundering scheme dis agreedis prys 160 million fine. The company placed much of the blame on single employee.

In July, Dingell's committee the distribution of the place of the p

Weich GE's chalman and chief ex-

questions un the estern and depth of Peace a fate small fave still atton Tuday, theulell is expected to face

a ecentify that suggests that Profit profited from he declings with the lan excellent, must have realised concliding was wrong and could The dealt GAO testlinary lays out

countered that Frost had first choice when directed by the brack to give work to certain submaries for And they say questions sale with Doing or chief toroth, we el's secuelty and the acce to make partied with statements about his

trad one shegallow that Frail of class knowledy shifted tederal strictions on the use of the authorities and money and that the compi "Alibungh all indications poin The OAD samuel also bentudes

because persuance. Prost by o a divelilon scheme bivulv

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South Korea Broadens Arms Scandal Probe

KOREA, From Page 3

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NASA, Hamilton Standard face questions on space toilet's price

By SUZANNE SATALINE
CROTTER SLOT Writer

WASHINGTON — The question passed in the gods of American space flight Tuesday was not how one goes to the hattroom in space, for that had been figured out long ago.

Tuesday, Congress asked the folks from NASA why the \$8 million price tag for a space shuttle toilet swelled to \$21.4 million in three years. Why, the members of the House space subcommittee asked, in the search for femi containment, was there no cost containment?

"We cannot ask Americans to tighten their belts and have NASA be dropping its pants on a \$23 million milet seat," said Rep. Timothy J. Roemer, D-Ind.

At first the answer from representatives of the National Aeronauties and Space Administration and Hamilton Standard, which built the space outhouse, was that the Improved Waste Collection System is no ordinary toilet.

Rather, like many of the weighty matters NASA deals with in a weightless environment, the space john is considered life-support equipment — as important to the astronauti as the air they breather

A working space toilet "can affect the morale and affect the mission." said Dan Germany, manager of NASA's orbiter and equipment pro-

"Sleeping, eating and waste disposal is all done in a close, confined area." Germany said. "If waste is not properly managed, the crew's health is at risk."

To sumulate all the comform of bome. Eamilton Standard has de-

signed a milet to keep the user on it and the waste in it. The commode, about half the size of a refrigerator, has the hairs and thigh hars, odor bacteria filters, a time fan separator and a system for feed compression—to make sure the feed matter doesn't hit the time fan.

The toilet is necessary, NASA contended, for extra-long days in space. If the agency is going to lengthen its missions, keeping the globe for two weeks to a month, something had to be done to keep all that smill on board.

"I wan: to get to the bottom of this," growled Rep. F. James Sensenbremer Jr., R.-Wis.

Maj. Gen. Jeremiah Pearson III. associate administrator of NASA's space flight office, blamed the agency for problems all the way down from bloated bureaucracy to missed requirements, to poor guesses on the cost of parts, to a system that allowed Eamilton Standard and contractor Rockwell International to beep pumping up the cost to cover mistakes. Just getting the system to compress waste increased the costs.

"I am not at all proud of our cost performance." said Fred Morris, a vice president and general manager at Hamilton Standard, a division of Hardord-based United Technologies Corp. "We clearly underestimated the total complexity. Most of (the blame) was on us."

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"I appreciate your candor." Sensenbrenner said. "but let me say I'm really disguited."

Other members piled praise on an

agency they belve long admired, but warned that taxpayers who came of age with Neil Armstrong would be lieve NASA had been ameared by "flushgate."

Whatever NASA's reputation was 30, 31 years ago," said Rep. Martin R. Hoke, R-Ohio, "now the reputation is that of a bureaucrain that is woefully, irredeemably mired—in its own red tape."

In Plot to Export Munition Pellets

Telesyse Inc. was indicated by a federal grand jury in Washington, D.C., along with three foreign companies and two individuals, on charges that they illegally conspired to export to the Middle Rast airconium pellets designed for use in mini-tions.

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The Teledyne Wah Chang Albany unit of Los Angules-based Teledyne last year was temporarily suspended from receiving ficaness for munition-related exports after Teledyne was indicated in a Minmi federal court in a related case. Then, the company was charged with exporting preceiving sectoring to Chilean arms broker Carrios. Cardoen, who allegedly used it in chaster bombs subsequently sold in Iraq. The Minmi case is continuing.

In a statement, Teledyne called the latest allegations of export violations unwarranted, and said it would "vigorously defend itself against the charges." The company said an export license had been obtained, based on assurances by the Greek government that the exported material wouldn't be improperly diversed. Tele-- dyne also said that in contesting the Mismi charges in court, it had had five of seven registral charges:): dismissed : Subsect sequently, the government chose to bring this action in the District of Columbia Deletyne said. dyne and companies from Greece, Ger many and Belgium conspired with a Teledyne Wah Chang salesman and a Beigianbusinessman in 1987 and 1988 in export siconium pellets worth about \$3.5 million. Exports allegedly were conducted without a proper license from the State Departent, and after the parties allegedly made: false statements to the Commerce Depart-

ment.
Telestyne could face fines of more than 300 million and possible debarment from U.S. export privileges if convicted, according to prosecutors. The former suspension of the Telestyne Wah Chang Albany unit has been in effect since July 26. The mineary has said the government's evidence in the Miami case doesn't support the allegations in that case, and has also each that the suspension isn't having a material adverse affect on its financial condition.

The company has been involved in numerous investigations in recent years. It has actively resolved many claims; of wrongdoing against it, agreeing, for example, to pay more than \$150 million in fines, penalties and civil settlements stemming from some of the cases. Teledyne, a diversified defense contractor and maker of industrial and consumer products, has said it may sell off some military businesses as part of a plan to emphasize mondelense operations.

Defense-Sector 'Offset' Deals

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Draft for GAO Finds Fault With Side Accords Tied To Arms Sales Abroad

BY JETT COLD

Buil Beauty of The Wall STREET JOSTONIA The decrine of the nation's defense industry is being hastened by Side deals in Classed Technologies Curp. and the air former arms-rate coursens that place ork with foreign companies and transfer secondary to them, a draft of a General · Accounting Office report concludes.

The "other arrangement, while isgal send jobs and technology attroad and est expensive for expenses, for the defense companies that make offsets part of their arms deals, and for some nondedense · businesses, the draft says. The report, based on an examination of 48 contracts washed at SILS billion, is expected to be presented today at a hearing of a House Energy and Commerce subcomminee on commerce, consumer protection and com-PRILIVEDESS.

Offset agreements "are hurting our commery and taking jobs away from the United States " said Rep. Cardiss Collins. an' Illimois Democrat and chairwoman of the supcommittee which is scrudinging बराजि ड्यांट कारो का तुर क्षकरार कालीवर finits on offsets.

·Hig defense companies have historically argued that offset agreements are necessary for competition with European arms-makers, which offer generous offset terins to buyers in the Middle East. Asia

The GAO report, however, moted that the U.S. is the only seller nation to provide contribut grants for buyers to use in paying for their arms. With those grains eliminaring the element of foreign competition, the study said, negotiations over offsets often ellow customers to pit competing U.S. beine concectors statues each other suc squeeze them for extra technology, subcontract work and other concessions.

During the last two decades, the report said, buyer nations have won SEO.1 billion in:U.S. foreign-military financing grants and loans to help pay for their purchases of U.S. tanta, planes, belicopters and other Systems. Defense contractors, meanwhile. have provided offset benefits that sometimes equal the value to the sale itself. and can require the U.S. company to provide beip selling the buyer nation's nondefense goods abroad

Frient of Inquiry

. In its investigation of offsets, the GAO. the investigative arm of Congress, examined arms sales between three major U.S. defense companies and the nations of Israel, Turkey, Egypt and Greece. The companies aren't named in the report to PROLECT PROPERTY information.

communes are McDonneil Dengias Corp. General Dynamics Corp., Locations Corp., CTREE-engines unit of General Electric Co.

: Perfection

The GAO draft report said offset-telated supcontracts placed with former suppriories "restricted in a loss of some production work" for the setier companies. The accentements also "result in displacement of U.S. subcontractors and create new competitors' stream.

Without mentioning specific compamies, the draft listed examples of domestic suppliers losing business or being forced to start down because their courses bad been transferred overseas to israel. Turbey or eisewhere. The report said U.S. defense company managers mid the GAO in confidencial interviews that even if क्लान्डचंट प्राव्यवाययटागड त्या क्रमण के costs and terms offered by a foreign supplier, prime contractors "would select the foreign supplier in satisfy the offset obligation."

Sale to Israel

One recent example, not mentioned in the report, involved McDonnell Douglas's successful contest against Lockheed to sell and billion in fighters to larset. U.S. grant funds are paying for most of the Israeli purchase. Both companies offered extensive offsets or assurances of "Industrial participation" in the future. The report did note that at times in the past, Israeli companies have been paid to produce parts for weapons systems that the U.S. provided to Israel "tree of charge."

. Some policy and market experts believe such generous U.S. practices beip ensure the loyalty and strength of strategic ailies. entrabes iscurrented and reliates lock up future business for the biggest American defense companies. "It's clearly been an American advantage." 5875 Geraid Segal of the international institute for Strategic Studies in London.

U.S. defense companies generally deny that texpayers bein pay the cost of offset arrangements, and that corporate coffers suffer to any great degree from the added expense. But the GAO found not only that the government heips benieved offset agreements, but that expenses for U.S. investment in foreign companies and for other offset dealings "are being taken out of contract profit or company earnings." in one example cited. U.S. defense companies financed a Greek corporation that in medical diagnostics, sportswar manufacturing, advanced wire bending machines, software systems and tex-

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generalisett op 18 och mer 1884 i 18 million (1884) i 18 million (1884) i 18 million (1884) i 18 million (1884)

ion questions links with China; company denies charges bearings on this ugly and job-threatening

WARD FRENCH I Inquirer Staff Writer

IT HARTFORD - The Machinists today called for an investigation into ik between Pratt & Whitney and what officials called "sweat shops" in main-

t both a Pratt official and an aerospace st today rejected the suggestion that t-shop labor in China is producing jet-

ie parts for Pratt. wording to the union, Chinese workers ing the equivalent of only pennies a day being employed to produce aircraft enparts for Pratt. As a result, union rials said, the company is tangled in a ble-edged moral dilemma - supporting a labor practices in the first place, and U.S. jobs to do it

a space that Pratt & Whitney turns he shops of China to produce parts z made by workers right here in Conzicut," according to a statement the ion distributed to Pratt workers today. e statement also asks workers to come ward with any evidence they may have of e Pratt-Chinese link, adding once suffient proof is gathered, the union will take case to Connecticut's congressional del-

Mary Ellen Jones, a Pratt spokeswoman, id the company does "sell engines in hina. And we have been talking with otential partners," she said, as part of the ompany's ongoing efforts to compete in an acreasingly global marketplace.

But the manufacture of aircraft parts is a ophisticated business requiring equally sophisticated and skilled workers, Jones said, flatly denying any use of sweat-shop

Mark Bobbi, an aerospace analyst with bor. Newtown-based Forecast International, also said Pratt isn't very likely using Chinese sweat shops to produce high-technology en-

-Parts for Pratt's industrial gas-turbine engine parts. gine, converted from aircraft engines, are being made by the Chengdu company in the le's Republic of China, Bobbi said. But vages being paid workers there are U.S. and European standards, he said, they're far removed from sweat-shop

said, adding mainland China has been im- to address the problem," according to the proving steadily its ability to produce aerospace products over the production requires skilled immoral, it will be illegal to take such because such production requires skilled immoral, it will be illegal to take such labor, he said, wages are appreciably higher advantage of oppressed Chinese workers,"

to help them make their case, and to push January to compensate for a decline in

"The Chinese are no slouches," Bobbi corporate practice, and demand legislation

"If the IAM gets its way, it will not only be

textile factories and other industries. Machinists have been seeking a variety of In addition, he said, the number of jobs methods to stem the tidal wave of layoffs at involved in aerospace production in all of Pratt in recent months, which included more China isn't enough to make a dent in the Than 500 jobs lost last week alone.

Machinists union officials however are layoffs are part of the company's Machinists union officials. Machinists union officials, however, are respect to the company's convinced otherwise. And in today's state reffort to cut 8,200 workers from its ranks by ment, union officials called on Pratt workers the end of 1994, a move announced in

for federal laws to stop such practices. Tom o defense business and commercial airline The aim is to call on Congress to hold orders alike we ban allegreed

Page 3: DAR Case 91-312 Pentagon Acquisition Reform

Considerable verbiage has been devoted to the quality factors of the logistical support program. For example, there has been question of the reliability of performance by the small business independents specifically at Kelly Air Force Base and the F100 aircraft engine. One element of shutting out the Independents is the introduction of a category called "Fracture Critical Parts". Significantly not a single small business supplied component was found to be the cause of engine failure or an aircraft crash. Another plus on the independence side of ledger is the face that the mandatory overhaul and repair cycle was upgraded from 1200 hours to 4000 hours. One can only surmise as to the under the fracture critical parts only the OEM is allowed to supply the parts at heavy cost increase.

MAJOR QUALITY PROBLEM:

The most serious problem arose at Voi-Shan - a supplier of proprietary fasteners. It was determined that the material did not comply with specs and was "under strength" thereby jeopardizing safety factors in numerous weapons systems - aircraft, tanks, et al. Investigation revealed the manufacture has been conducted by Japanese sources.

There was a number of items which - if OEM's are placed in administrative control - circumvent the 1984 Goldwater-Nichols Competition In Contracting Act.

- Blueprints from OEM's rather than as currently structured.
 Small Businesses now obtain the blueprints, specifications and regulations from the services in 4 to 6 weeks. We have been informed that depots encounter a 4 to 6 months delivery factors.
- Minor changes particularly dimensions necessitate a re-qualification by an established alternate source. This practice can well delay a procurement freezing out an economical source and elevating the OEM to being the only qualified source at increased cost.

F100-PW-229 FAILURES AFFECT F-15E READINESS

STANLEY W. KANDEBO/NEW YORK .

Two back-to-back engine failures in two Alaska-based U.S. Air Force F-15Es have left the service with unflyable fighter/bombers and an array of unanswered questions surrounding tests that failed to accurately predict operational stress levels encountered by the aircraft's Pratt & Whitney F100-PW-229 powerplants.

Twenty-three engines—at least half of the powerplants in the 20 F100-PW-229-powered F-15Es based at Elmendorf AFB, Alaska—have been removed from flight status after two of the aircraft suffered in-flight engine failures in a single week.

According to Air Force officials, both aircraft were operating from Eielson AFB, Alaska, due to repair runway work at El-

mendorf. The first engine failure was uncontained and occurred on June 10 when an F-15E was climbing to altitude. The second, a contained failure, followed on June 17 and occurred when the pilot was flying a "rather benign" flight profile. Both pilots were able to land their aircraft safely, but in the first instance the F-15 was forced to land on a commercial strip in Galena, Alaska.

Early analyses by Air Force officials indicate that the engine failures are a continuation of fourth stage turbine blade-cracking problems that first surfaced in the Pratt &

Whitney F100-229 powerplant about one year ago.

APPROXIMATELY 75 F-15Es based at Elmendorf; Lakenheath, England, and Nellis AFB, Nev., ultimately will be affected by the ailing F100-229s. To date, Lakenheath's F-15s have been trouble-free, probably because international agreements restrict their operational high-speed, low-level flight activities—conditions which appear to promote the cracking problem. To avoid replicating the conditions under which the blades failed, all F100-229-powered F-15Es will be restricted to speeds under 550 kt. at low altitudes, at least until an interim fix is implemented.

Due to interim blade fixes initiated earlier this year, some 54 F-16C/Ds based at Mountain Home AFB, Idaho; McEntire AFB, Ga., and Nellis AFB are not immediately affected by the blade-cracking problem.

To prevent additional engine failures, Pratt and the Air Force have mandated blade changes in many F100-229s powering F-15Es. Specifically affected are all F-15E-based F100-229 engines that accumulated more than 200 tactical cycles prior to the installation of engine control vibration avoidance software earlier this year. Twenty-one engines are immediately affected at Elmendorf as well as the two engines that already experienced failures—a total of 23.

To expedite the return of Elmendorf's F-15Es to operational status—the aircraft would be used to support forces in Korea in time of war—the Air Force last week began to ship replacement blades to the base. All of the blades incorporate an in-

F100-229 propulsion problems ultimately will affect the operational status of approximately 75 F-15Es worldwide.

terim configuration developed to temporarily fix F100-229s powering F-16C/Ds.

Engine modules and 12 engines pulled from McDonnell Douglas and Lockheed aircraft production lines also are being directed to Elmendorf. Additionally, two more powerplants undergoing overhaul and repair and two at Edwards AFB, Calif., also were expected to be sent late last week to help alleviate the situation.

Air Force officials believe they have sufficient assets to cover the localized engine shortage at Elmendorf, and they are confident all aircraft affected by the engine problem will return to operational status in several weeks. Typically, it takes three days to remove an engine, reblade it and

reinstall it. Officials said several sets of blades were expected to reach the base last week, and that Pratt & Whitney personnel had been dispatched to assist in the reblading effort.

In contrast to reblading, replacing an F-15E's engine takes less time, typically several hours. However, of the 16 engines planned for dispatch to Elmendorf, only nine are equipped with interim fixes that eliminate the turbine blade-cracking problem and the 550-kt. flight speed restriction.

F100-229 fourth-stage turbine blade problems were first diagnosed about one year ago after two Elmendorf-based F-15Es suffered blade failures in April and June, 1993. Investigation of the initial failure determined a casting defect caused the blade to break.

As a result, blade inspections were stepped up, an extensive reblading effort was instituted and all suspect blades were purged from the F100's logistics system. When a second failure occurred in what was assumed to be a defect-free blade in June, 1993, analyses led offi-

cials to a new reason for the failures.

From engine tests run in the spring and fall of 1993, officials were able to deduce that two vibrational problems were causing the failures. First, small blade cracks were being initiated when the engine was operating in cruise power ranges at some specific altitudes and engine speeds. The cracks were then propagating due to the combined effects of the cruise power range vibration and a non-integral (non-resonance) vibration that occurs when the engine operates in the military power regime.

To alleviate the blade-cracking, Pratt and the Air Force decided upon a single long-term fix and separate interim fixes for F100-229-powered F-16C/Ds and F-15Es. The long-term fix called for developing a more robust blade and disc assembly in which the blade root and disc are widened. This design, which adds 13 lb. to the engine, is now undergoing ground qualification testing and is expected to be available in November.

SINCE THE F-16 is a single-engined aircraft, the short-term fix for its F100-229s focused on operational safety. Consequently it was decided to replace the original bill of material fourth-stage turbine blades with an interim blade. The interim blades, which were fielded in April, have a redesigned shroud that improves their damping characteristics.

In addition to the interim blade, officials also plan to install software that

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should allow the powerplant's digital electronic engine control (DEEC) to avoid conditions that generate crack-initiating vibrations. This software is undergoing operational tests and should be available this summer.

A DEFFERENT SHORT-TERM solution was approved for use in the F100-229 -powered F-15E because F-15E engine blades had already been heavily inspected following the first fourth blade failure. Additionally, the first failure also prompted Air Force officials to change F100-229 turbine blades in F-15Es once they accumulated 600 tactical cycles.

As a result of these inspections and replacements, Air Force and contractor officials felt that risks were low and passed on performing interim blade retrofits. Instead, they believed that if the engines acarmulated fewer than 300 tactical cycles, and if vibration avoidance software was added to the engine's DEECs, their bill of material blades would last until the permanent fix was installed. The DEEC software was fielded in April. But the two infight failures that occurred this month have challenged the wisdom of not reblading the F-15E's F100-229s.

Preliminary analyses of the blades and discs recovered from this month's failures point to troubles with the powerplant's fourth stage turbine blades. According to Air Force officials, calculations now indicate that the failed fourth stage blades were subjected to non-integral vibratory stresses that were about 50% greater than those generated in tests last year at the USAF's Arnold Engineering Development Center near Tullahoma, Tenn.

Officials now theorize that blade cracking growth occurred at a far greater rate than was anticipated due to the higher than expected stresses. The real issue, according to USAF officials, is why there was such a large variance between predicted stress levels and levels encountered in actual flight. Investigators and researchers hope to find out soon.

Despite the dearth of information surrounding the disparity in anticipated stresses, the Air Force and Pratt late last week were moving towards agreement on a new interim fix for the F-1.5Es;

ACCORDING TO USAF officials, a favored option is to retrofit the F100-229-powered F-15E fleet with interim blades developed for the F-16C/D's F100-229 engines. Alternatively, if the new, permanent blade/disc redesign is available before the completion of the interim blade retrofit, the permanent fix would be installed.

COMANCHE PRODUCTION SLASHED IN FIRST FIVE YEARS

DAVID FULGHUM/WASHINGTON

Production of the first RAH-66 Comanche scout/attack helicopter has been speeded up six months, but the total number of aircraft to be built in the first five years of the program has been slashed.

ee The Army's new helicopter program will produce 153 Comanches between mid-Fiscal 2000 and the end of 2005 instead active 408 that had been scheduled, according to Brig. Gen. Orlin Mullen, the Army's Comanche program manager.

wery conservative ramp" to full-scale production to mitigate changes or retrofits to early production helicopters.

THE CHANGE IN SCHEDULE also was portrayed as a response to Defense Dept. concoms—in particular, the conventional systems committee of the Defense Acquisition Board (DAB)—that there was too much concurrency in the program.

"They said, 'we are concerned with the accumulation of risks associated with engineering changes," Mullen said.

Comanche program officials decided the best way to answer these concerns was to make development and production of the RAH-66 longer, slower and more careful, he said. Full rate production of 120 aircraft per year will not be reached until after 2005 instead of in 2004.

The new Comanche development plan shows "a very conservative ramp—three, eight, ten, twelve—that mitigates or reduces the chance of having large numbers of aircraft that have to have changes made on them," Mullen said.

 Congressional critics contend that the real reason for the program's slowdown

is simple lack of funding. The U.S. Army has given maintenance of a "large force structure priority over modernization," a Congressional staff member said. "You can say almost any program has too much concurrency."

Critics claim that unmanned cerial vehicles like the Army's Hunter or the joint service Pier 2 UAV could do the reconnaissance role more cheaply and with less danger to aircrews.

An additional alteration of the program was to smooth the demonstration/validation and engineering and manufacturing development (EMD) stages into a single development phase.

"People have thought we are trying to either start EMD early or avoid the decision process; [but] we're not," Mullen said. "Frankly, we're adding to the trips we would make" to the Pentagon and Congress by scheduling more reviews to explain and justify the program.

Headline News coverage continues with these space and military stories:

- M 5 booster development problems will delay scientific missions until '96.............82

- F/A-1 8E/F on track for first flight in late '95, based on critical design review......84

....

"We're trying to . . . have the approving oversight agencies involved on a continuous basis," Mullen said. "It makes our job easier if people are informed all along about how we are doing."

The first flight of a Comanche prototype was slipped from November, 1995, to early 1996. The second prototype will fly first in mid-Fiscal 1998. A third prototype will not be built; however, three low-rate initial production aircraft will be used as test aircraft instead (AW&ST June 6, p. 81).

Conducting the final EMD demonstrations with low-rate production aircraft will not only save the cost of building an EMD prototype, but also oddress criticism of the AH-64 Apache program that operational testing was conducted with a nonrepresentational aircraft, Mullen said.

THE NEW SCHEDULE will result in production of three Comanches in Fiscal 2000, eight in 2001, 10 in 2002, 12 in 2003, 48 in 2004 and 72 in 2005, where Mullen's program chart ended. The rate eventually will reach 120 helicopters per year, but the exact year has not yebeen set. The previous schedule had RAIS 66s being built at a rate of 24 in 2003, 48 in 2002, 96 in 2003 and 120 in both 2004 and 2005.

Readiness of the first operational C manche unit would slip six months fro early 2003 to late 2003. Mullen sat that so far there is no change in the production objective of 1,296 total aircrabut "I would not be surprised if the evolved [downward] as force structure [shrink]."

Program officials have decided to abo don the helicopter's triple redundant so ty system where it makes significant so ings in design or production costs, ev at the cost of added weight.

For example, "It allowed us to use a minum instead of [more expensive] li um aluminum," Mullen said.

ATTACHED IS AN INDEPENDENT ANALYSIS OF F-100 ENGINE REPLACEMENT PARTS PRICES AS THEY WOULD BE SUBJECT TO COST PRICE INCREASES. IN ESSENCE THE AIR FORCE WOULD BE PAYING MORE FOR LESS. YOU MAY WISH TO HAVE THE GAO CONDUCT THEIR OWN INVESTIGATION TO VERIFY OR REFUTE THE PROJECTION ON 191 COMPONENTS.

In 1992, Kelly Air Force Base identified 411 engine components in the F-100 that they determined should be designated as fracture critical or durability critical. This terminology was not an adjective used to describe jet engine components as a result of any catastrophic disaster or simulated flight failure analysis, but rather a definition buried in a 1984 Military Standard for the Engine Structural Integrity Program.

Once uncovered, it has become the focal point of attention at Kelly by providing a loophole to the 1984 Competition in Contracting Act by allowing the Air Force to rescind contractor approval to manufacture these components and direct these orders back to the prime manufacturer.

Contractors who previously supplied specific components to the Air Force suddenly found their approvals withdrawn, their contracts terminated for the convenience of the government, and the re-qualification requirements imposed by the Air Force so ludicrous that even the prime manufacturers would be hard pressed to meet them.

expense. How much? Based on a current analysis of Pratt & Whitney's stock list price to the government and the last competitive procurement price of 191 fracture/durability designated components, the government would save over \$400,000.00 per F-100 engine or \$1.4 Billion for one set of the 191 fracture/durability components if they competitively procured these items for the 3400 F-100 engines currently in US Air Force Inventory.

The figure of \$1.4 Billion does not include the unfathomable cost being incurred in ongoing termination settlements and re-procurement charges.

National Health Care, Flood and Drought Relief as well as the Entitlement Programs would benefit tremendously from the savings realized through competitive procurement. The Air Force could purchase over 400 new F-100 engines, or 56 F-16 aircraft or 3 C-17 aircraft. The Air Force would be well served to re-invest the savings from competitive procurements to support their needs instead of continuing to request budget increases in a time of spending reductions.

The Defense Budget historically has been based for the last ten years on competitive procurement of replacement spares, which has allowed DOD to reduce its annual expenditures for spares while maintaining consistent inventory stock levels.

It is not the government's responsibility, nor should it be the government's task to insure the prime manufacturers are supported with defense procurement acquisition levels that defy the overall world-wide economic slowdowns. The government should insure that both the small business community and the prime contractors are adequately supported to maintain their existence, taking into consideration overall defense cutbacks and current economic factors.

At a time of increased pressure to reduce the budget/deficit, it is unconscionable that the Government would place itself in such a precarious position as to have to choose between mission readiness or a self serving OEM enrichment program.

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	SAV D
ACTUATOR PRIMARY ACTUATOR PRIMARY	4052340 4074746	9674.21 10881.19	7075.47 8018.86	2598.74 2862.33	27% 27%
AIR-OIL COOLER	UA535953-7	1365.99	1037.40	328.59	24%
BEARING NO 2 BEARING NO 2 BEARING NO 2	4000352 4000425 4037050	1737.84 1737.84 1737.84	1375.00 1375.00 1375.00	362.84 362.84 362.84	21% 21% 21%
BEARING NO 3 BEARING NO 3 BEARING NO 3 BEARING NO 3	4035421 4035594 4048700 4056777	2144.19 2144.19 2144.19 2144.19	1650.00 1650.00 1650.00 1650.00	494.19 494.19 494.19 494.19	23% 23% 23% 23%
BEARING NO 4 BEARING NO 4 ARING NO 4 BEARING NO 4	4059297 4059298 4059299 4059349 4061007	1712.56 1712.56 1712.56 1712.56 1712.56	1355.00 1355.00 1355.00 1355.00 1355.00	357.56 357.56 357.56 357.56 357.56	21% 21% 21% 21% 21%
BEARING NO 5	4055599 4066596 4066597 4066598 4067082	1202.05 1202.05 1202.05 1202.05 1202.05	983.00 983.00 983.00 983.00 983.00	219.05 219.05 219.05 219.05 219.05	19% 19% 19% 19%
BLADE COMP STG 2 BLADE COMP STG 2	4041272 4051092	762.19 34.22	561.71 25.07	200.48	27% 27%
BLADE COMP STG 4	4063904	47.97	35.75	12.22	25%
BLADE COMP STG 5	4040205	39.83	30.78	9.05	24%
BLADE COMP STG 6	4040806	43.67	34.98	8.69	21%
BLADE COMP STG 8 BLADE COMP STG 8	4044908 4052808	39.22 34.88	30.18 27.73	9.04 7.15	24% 21%
		*			

PAGE 2:

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	\$SAV D
BLADE COMP STG 9	4040809	32.93	26.38	6.55	19%
BLADE COMP STG 10	4040810	33.85	26.50	7.35	22%
BLADE COMP STG 11	4040811	33.80	27.80	6.00	19%
BLADE COMP STG 12	4040812	31.94	25.86	6.08	20%
BLADE COMP STG 13	4040813	35.42	27.26	8.16	23%
BLADE RTG ASSY	4066777	231.82	176.00	55.82	24%
ADE RTG ASSY	4057239	21468.98	14500.00	6968.98	33%
SLADE TURB STG 1	4057491	802.70	152.50	650.20	81%
BLADE TURB STG 2	4057002	462.82	113.00	349.82	
BLADE TURB STG 4	4067004	133.87	118.00		12%
CASE ASSY 10-13 CASE ASSY 10-13	4062766	14360.60 9643.41	11362.00 1794.45	2998.60	21%
CASE ASSY COMP	4040995	3283.81	2420.00	863.81	
CASE ASSY COMP	4037989 4046497	81.67 9199.88	60.63 6780.00		26%
CASE ASSY DIFF	4068322 4070870	79942.41 79942.41	22174.00 22174.00		73% 73%
CASE FAN INLET	4001727	41849.70	30235.00	11614.70	28%
CASE FAN STG 3	4043285	4340.27	3400.00	940.27	22%

PAGE 3:

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	SAV D
CONVERG NOZZLE	4077809	1358.99	980.00	378.99	28%
COUP ASSY GEARBOX	4067183	778.78	389.00	389.78	50%
DAMPER BLADE	4024039	3.69	2.13	1.56	43%
DAMPER BLADE	4012715	4.96	1.68	3.28	67%
DISK COMP	4059171	14472.58	11800.00	2672.58	19%
DISK COMP	4069904	10290.52	8142.00	2148.52	21%
SK COMP	4030605	9270.54	5750.00	3520.54	38%
DISK COMP STG 8 DISK COMP STG 8	4040108 4061508	9186.13 9186.13	5300.00 5970.57	3886.13 3215.56	43% 35%
DISK COMP STG 9	4022609	18463.13	12345.50	6117.63	34%
DISK COMP STG 10 DISK COMP STG 10	4022610 4069910	8687.94 8687.94	5800.00 7150.00	2887.94 1537.94	34% 18%
DISK COMP STG 11	4022611	16646.82	13000.00	3646.82	22%
DISK TURB STG 1	4059091	24027.64	9475.00	14552.64	61%
DISK TURB STG 2	4059092	22209.28	6996.00	15213.28	69%
DISK TURB STG 4	4043704	10590.97	9127.00	1463.97	14%
DIVERGENT NOZZLE	4056264	1790.36	1234.00	556.36	32%
DIVERGENT SEAL DIVERGENT SEAL	4072683 4076459	442.14 455.41	347.90 402.00	94.24 53.41	18%

PAGE 4:

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	SAV D
DRIVESHAFT COMP	4047579	14802.49	11320.00	3482.49	24%
DUCT FAN FORWARD DUCT FAN FORWARD	4046405 4065899	46174.90 36847.00		8174.90 5347.00	18%
DUCT SEG TURB	4057521	137.19	109.90	27.29	21%
DUCT SEG TURB	4070422	119.52	95.75	23.77	21%
DUCT SEG TURB	4066963	472.58	398.00	74.58	16%
DUCT SEG TURB	4063721	459.65	405.14	54.51	12%
FUEL OIL COOLER	UA539800-1	6113.15	5031.00	1082.15	18%
EARBOX COVER	4047095	456.78	327.00	129.78	29%
GEARBOX LINK ASSY	4031264	54.93	44.00	10.93	19%
HOUSING ASSY BRG	4018467 4035597 4040284	1361.45 1361.45 1361.45 8188.98 1361.45	1200.00	161.45 161.45 161.45 2153.98 161.45	
HOUSING	4068639	1579.66	1300.00	279.66	18%
HOUSING	4057683	146.48	124.00	22.48	16%
LINER ASSY	4057394	310.31	287.66	22.65	8%
LINER COMB	4066944	10352.24	8650.00	1702.24	17%
LINER CONVERG LINER CONVERG	4060955 4068401	95.61 95.61	87.22 87.22	8.39 8.39	9 % 9 %

PAGE 5:

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	\$SAV D
NUT DRIVESHAFT	4026463	463.43	349.00	114.43	25%
NUT DRIVESHAFT	4047224	3482.26	1735.00	1747.26	51%
OIL TANK OIL TANK	4043867-706	5911.33	3900.00	2011.33	35%
	4066724-700	6258.14	5350.00	908.14	15%
RING ASSY BRG 4	4071088	5560.76	5027.00	533.76	10%
RING ASSY IN	4037628	10800.09	1250.00	9550.09	89%
RING ASSY IN	4061761	3077.16	2124.50	952.66	31%
RING ASSY IN	4067727	1078.48	922.00	156.48	15%
RING ASSY OUT	4032800	8172.97	769.28	7403.69	90%
RING ASSY OUT	4060230	2001.33	1764.00	237.33	12%
ING ASSY TURB	4023077	2173.45	563.00	1610.45	75%
	4063436	1184.74	975.00	209.74	18%
RING ASSY TURB	4042692 4066127	988.93 363.05	761.00 320.00	227.93 43.05	23%
RING SEG TURB	4057764	238.25	210.00	28.25	12%
	4066963	472.58	398.00	74.58	16%
SEAL AIR BRG 4	4036962	1600.73	725.00	875.73	55%
SEAL AIR COMP	4066997	10818.92	2660.00	8158.92	76%
SEAL AIR COMP	4064666	1394.38	1000.00	394.38	29%
SEAL AIR COMP	4061280	1872.55	1380.00	492.55	27%
SEAL AIR COMP	4064667	1685.21	1350.00	335.21	20%
SEAL AIR COMP	4064670	2446.25	2375.00	71.25	3 %
SEAL AIR COMP	4079078	2446.25	2375.00	71.25	3 %
SEAL AIR COMP	4062764	4008.85	2711.00	1297.85	33%
SEAL AIR COMP	4062765	2963.71	2250.00	713.71	25%

PAGE 6:

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	SAV D
SEAL AIR COMP	4061976	1916.20	1577.00	339.20	18%
SEAL AIR COMP	4061977	2902.85	2389.00	513.85	18%
SEAL AIR COMP	4050978	1547.58	1080.00	467.58	31%
SEAL AIR COMP	4061978	1682.57	1240.00	442.57	27%
SEAL AIR COMP	4061979	1860.42	1472.00	388.42	21%
SEAL AIR COMP	4043280	2916.74	1970.00	946.74	33%
SEAL AIR COMP	4050980	2916.74	1970.00	946.74	33%
SEAL AIR COMP	4061780	1519.49	1299.00	220.49	15%
SEAL AIR COMP	4041591	2887.20	1240.00	1647.20	57%
EAL AIR COMP	4047471	2887.20	1240.00	1647.20	57%
EAL AIR COMP	4061771	1698.74	1398.00	300.74	18%
SEAL AIR COMP	4047472	2931.62	1980.00	951.62	33%
SEAL AIR COMP	4061772	1430.16	1177.00	253.16	18%
SEAL AIR COMP	4041592	2931.62	1980.00	951.62	33%
SEAL AIR TURB	4057764	238.25	210.00	28.25	12%
SEAL AIR TURB	4064338	1266.15	1058.00	208.15	17%
SEAL AIR TURB	4063721	459.65	197.00	262.65	57%
SEAL AIR TURB	4064337	2764.81	2099.00	665.81	24%
SEAL ASSY FACE	4031516	1296.28	929.65	366.63	29%
SEAL ASSY FACE	4031517	1296.28	929.65	366.63	29%
SEAL ASSY FACE	4033283	603.83	445.00	158.83	27%
SEAL ASSY FACE	4012468	670.60	313.90	356.70	54%
SEAL ASSY FACE	4035883	1311.34	700.00	611.34	47%
SEAL ASSY FACE	4014756	1387.73	910.00	477.73	35%
SEAL ASSY FACE	4014757	1387.73	910.00	477.73	35%

PAGE 7:

FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	\$SAV D
STATOR ASSY	4064066	22783.20	7160.00	15623.20	69%
STATOR ASSY	4064067	22286.70	6850.00	15436.70	70%
STATOR ASSY	4064068	21429.44	6606.00	14823.44	70%
STATOR ASSY	4064069	17368.52	6560.00	10808.52	63%
STATOR ASSY STATOR ASSY	4064071 4067481	8714.93 17214.69	5916.26 7819.60	2798.67 9395.09	33% 55%
STATOR ASSY STATOR ASSY	4056232 4067482		10900.00 10856.61	4554.44 11020.80	30% 51%
TATOR ASSY	4064083	5760.77	4640.00	1120.77	20%
SUMP ASSY BRG	4053992	218.66	157.00	61.66	28%
SUPPORT ASSY	4034875	5221.99	4494.00	727.99	14%
SUPPORT ASSY	4041794	5407.43	3985.00	1422.43	27%
SUPPORT ASSY	4034246	2437.01	1445.00	992.01	41%
SUPPORT DUCT	4055259	3738.40	2608.86	1129.54	31%
SUPPORT DUCT SUPPORT DUCT	4063469 4070421	858.75 3188.68	833.00 1267.00	25.75 1921.68	3% 61%
SUPPORT RING	4066128	1490.65	1313.87	176.78	12%
SUPPORT RING	4061514	1346.92	1079.00	267.92	20%
SUPPORT SEAL	4065651	8364.26	6350.00	2014.26	25%
SUPPORT SEAL	4028004	5814.38	4285.00	1529.38	27%
SUPPORT SEAL	4028004 	5814.38	4285.00	1529.38	27%

PAGE 8:

PRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	\$SAV D
SUPPORT STATOR SUPPORT STATOR SUPPORT STATOR	4056576 4073624	11405.34 14256.47 14256.47	4054.81 8949.00 12188.00	7350.53 5307.47 2068.47	15%
SYNC RING ASSY	4043182	6302.63	5000.00	1302.63	
TIEROD NUT TIEROD NUT TIEROD NUT TIEROD NUT TIEROD NUT	4059418	10.08	6.32 3.10 6.47 7.14 19.64	.54 2.94 14.65	27% 8% 30%
TOROD REAR OD REAR THROD REAR	4048153	11.07 10.89 9.44		2.87 2.69	26% 25%
TOWER SHAFT	4011830	458.30	332.00	126.30	28%
TURB EXH CONE TURB EXH CONE TURB EXH CONE		1064.49		279.99	27%
VALVE OIL VALVE OIL	4069248 4065818	4.22 20.80	3.25 15.35	.97 5.45	23% 26%
VANE ASSY TURB	4039683CLN	906.39	397.80	508.59	
VANE VAR COMP	4066750	677.49	485.00	29.60 76.87 192.49 195.63	29%
VANE VAR COMP VANE VAR COMP	4043454 4062264	123.04 119.10		34.79 24.86	
VANE VAR COMP VANE VAR COMP		110.62 113.17	79.34 89.55	31.28 23.62	

PAGE 9:

FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT	BREAK OUT SAVINGS	\$SAV
VANE COMP	4063958	4.69	3.46	1.23	26%
VANE COMP	4063959	5.37	4.30	1.07	20%
VANE TURB	4056771CLJ	2163.73	1130.00	1033.73	48%
VANE TURB	4056771CLK	1713.16	1510.00	203.16	12%
ANE TURB	4056771CLL	1908.46	1130.00	778.46	41%
ANE TURB	4056771CLM	2105.47	1200.00	905.47	43%
VANE TURB	4056771CLN	2105.47	1130.00	975.47	47%
VANE TURB	4056781CLL	1676.52	1170.00	506.52	31%
TOTALS	\$	997,786.30 \$	579,524.08	\$418,262.22	42%

Page 4: DAR Case 91-312 Pentagon Acquisition Reform

- 3. First Articles: Another rear regard action by OEM's has been the introduction by DoD requiring that alternate small business sources re-qualify every two years their manufacturing process even if the component is currently being produced by the Independent. Thus added cost and extended delivery cycles.
- 4. Currently Independent Small Businesses contracting directly to OEM's are experiencing payment cycles of 90 to 120 days after delivery. To put progress payments under OEM's would be a fiscal disaster for DoD and a murderous financial burden on the Independents. Markets other than defense are fraught with fiscal problems many of which involvement of bankruptcies. See Wall Street Journal article by Stephanie Mehta.
- One of the reputed cost cutting moves within the military is the bundling of several different parts in a bid package. The packaging usually has within it a proprietary part unavailable to an independent. One of the conditions of these groupings is that a potential contractor must bid all items or be classified as "non-responsive" DoD/OEM's version of a poison pill.
- 6. An imperfection in the Navy Aviation Supply Office procurement is a high frequency of bid sets with the notation "prints" not available. This is ingenuous since Naval Air Technical Service facility is in the same compound in Philadelphia. Thus a road block cuts the Small Business Independent off at the pass.

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Businesses Try to Cope With Customers' Bankruptcies Aircraft-Parts Dealers Learn Painful Lessons From Filings by Airlines

BY STEPHANIE N. MEHTA

Staff Reporter of THE WALL STREET JOURNAL navigate Cast Lid., his small aviationparts business, through a turbulent economy. The problem is, many of his customers keep going bankrupt. Jim Newham has somehow managed to

customers have gone out of business with company. He says at least three other the six year history of the Bay Shore, N.Y., filed for protection from creditors during Bight of Casi's airline clients have

out attempting to reorganize. parts for commercial airlines core business - buying, trading and selling the company's strongest year. Profits also are down, he adds. And now, two striines dropped a third from \$2.4 million in 1990 to recover more than \$56,000 that they paid In bankruptcy proceedings are suing Casi during the months before their bankrupicy illings. "I'm completely demoralized," the entrepreneur says. Mr. Newham says sales from Casl's

sunk many compelliors, Mr. Newham and some other aviation-industry entrepreeffect of multiple airline bankruptcles has neurs are keeping their small firms alloat by taking a "lessons learned" approach. resources, screening old accounts and us-They're offering new services, pooling ing stricter credit standards when they Yet he is surviving. While the ripple

court new clients. for example. By concentrating on commisish, is pursuing more consignment work, Sion said Casl, which means "aimost" in Spanther companies' parts and Newbarn says he was able 1963 total sales to 12.

1. 2.1.

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The state of the s

million, up about 24% from 1992. it tough to shift gears when their biggest nothing more than good business sense. customers file for bankruptcy protection But struggling small companies often find Association of Bankruptcy Trustees says Saul Bisen, president of the National Admittedly, such tactics sound like

continues to ask a small business for its of the U.S. Bankruptcy Code sometimes Washington. business moving," says Mr. Bisen, who services — and its credit. Small companies also practices law in Cleveland. But if an "need the business to keep their own adds, a small supplier can end up with even sirline never emerges from bankrupicy, he An airline operating under Chapter 11

on Continental Airlines. The small aircraft-parts repair concern in North Tongreater losses. bankruptcy court, from December 1990 to fore, during and after its latest turn in April 1993. But after seeing some clients go awanda, N.Y., worked for the carrier beinstruments & Avionics Inc., took a chance cautious about extending credit to Conti-Blickenstall says he became much more broke and his bills then go unpaid. Mr. Jack Blickenstall, president of Aero

seeks new accounts with major airlines. past, the firm would sometimes allow a It imposes tougher credit guidelines. In the treight carriers and airline start ups. And instead, it is cultivating business with client to let payments lapse. Not anymore Mr. Bilchenstall says. "We're more carehad today than we were three or four, Today. Aero instruments no longet

years ago," he says of the \$8-employee

president of International Technical Conlegal help in bankrupicles. Mr. Wagner, taught Ed Wagner the value of local parts, has found local representation sultants Inc., a Mismi supplier of aircraft trustee ends up suing its creditors. especially important when a debior's Repeated rides in the creditor's seat

cargo carrier's trustee sued the unsecured Ypsilanti, Mich., filed for bankruptcy proaller Flagship Express Services inc. of creditors paid by Flagship Express during lection last December. The freight and Mr. Wagner, previously hit by such "pref. the 90 days before its bankruptcy filing. test this one. But he could not afford a erential payment suits," decided to conlawyer in the Detroit area, where the case That's what happened a few months

small creditors, including Cast and Aero retain a Southfield, Mich., attorney to instruments, to pool their resources and So, Mr. Wagner persuaded 14 other

represent them. Most small-business creditors are less orare skeptical about whether those credi-Flagship Express. But bankrupicy lawyers ganized than the ones being sued by creditors in the 90 days before a filing. retrieving payments made to unsecured lets trustees maximize a debtor's estate by tors will succeed. Federal bankruptcy law later divide what's left of the estate after Unsecured creditors such as Mr. Newham he lawyers and secured creditors, such as The idea is novel, Mr. Eisen says. ha, get paid.

tions of small-business creditors. "It's trustee, says he understands the trustra tough," he says. "But I still have to pursue Basil · Simon, Flagship Express's.

emerged from bankrupicy protection last much-If any-of the money that Flagship Express owes him. When Continental represented three cents for every dollar year, Cast received a check for \$67.51. That the airline owed the supplier. Mr. Newham doesn't expect to see

Cast also is being sued by Midway...
Airlines for \$36,000 in another prefer. ential payment sult. "I can't afford that," pay them?" do? Go out and mortgage my house and Mr. Newham says. "What am I supposed to ...

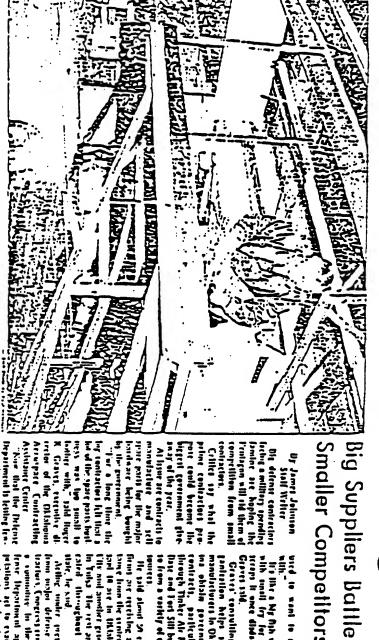
suits have taken an emotional toll on him... crazy," says Christopher Steele, a Selau. unfairness is something that's driving him "He runs a wonderful business. But the ket, N.Y., attorney for Cast. Mr. Newham admits that the law-

or lease part of the company's 16,000employee operations. He now wants to self. have taken a toll on Mr. Newham's eightsquare-foot headquarters. Meanwhile, he adds, Casl cannot afford to acquire new aging second generation aircraft parts. inventory and is trying to sell its stock of The multiple client bankruptcles also

plains. "What else would I do? The next thing to do is retire." stay in business? He says he loves the cles in the next few years. So why does he bracing himself for more airline bankrupt aviation business too much. "That's my" life," the 58-year-old entrepreneur ex-And the sags isn't over. Mr. Newham is Page 5: DAR Case 91-312 Pentagon Acquisition Reform

- 7. Generic Qualification: We believe that generic qualification will lessen the administrative burdens of the Government with its attendant cost reductions within the military and additionally via the supplier network. Such designs would encompass spacers, seals, blades and vanes, vane and shroud assemblies et al.
- 8. Should OEM's be assigned administration of DoD procurement, we believe that our access to freedom of information will be seriously curtailed.
- 9. Overhaul & Repair Rights: Numerous Independent Small Businesses have developed procedures and techniques for repair of a variety of components. This requires substantial investment of their own funds. Should such be done on military units, we believe that the developer be granted exclusivity in military contracting of 3 years in order to recover funds expended in the research and development process.
- 10. There has been a battle raging between small business and OEM's for more than 2 years within the 807 Group. With only one small business representative in the group, the voice of Small Business was seriously curtailed. Letter writing to members of congress was a weapon used to stimulate a sense of justice for the independent contractors who have given credibility to the competition in contracting act in its goal to save taxpayer monies by reducing costs.

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Squeeze

The government has been actliems. The government has been giving this information is competcesses involved in production of lille to specifications and percesses ng under the theory that it retains

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ware ranging from step stools to tollet seat covers, which figured in and other outlandiship priced hard. could signal a return to the bad old days of 1999 pilers. SISS hammers lion for space parts contracts also Defense procurement assiciul pending scandals as recently as

tractors who provide space parts to Thicker repair shops. itemed shows Utlishamis subconetition advocacy at Timber Air over Bage, deellned in be luter. liillip Waller, director of com-

on record felling the number of such subcontractors. office sold Waller's office knows of

compellion advocacy office also doesn't know whether and the The Tinker pistement said the

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Ityrloped under government A. port probably will be line port to the Fenlagon, said the ce lind) committee preparing entractors, and ing firm terring space parts sub countral Acceptabil a consult in San Antonio. Mich ite; nolds.

"We've been meeting since July.
and it looks like the report will be slipped until February. he said Repoolds said the committee approve to be neighbord in favor of the

ard iccomp of passible compromise has develof prime contractors, but evidence He said that without compro

mise, he plans to complicate the final recommendation to the tre fense treparament with a minority

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ment significantly lanes for compellion for trace pails fro duction keeps could in the govern Reprolds sald small subsential

gains we realised through contract are proposing goes through it has the potential to cancel all of the "If what the prime conteacter It added that critical munitions capabilities are central to U.S. military strategy.

The report recommends a five-step plan "to preserve a munitions production capability for this nation." The first and most urgent action is to "establish a floor under munitions runding of approximately 52 billion." Such a floor, the report contends, will permit the munitions industrial base sector "to rationalize its capabilities and achieve greater pencies to meet military requirements as they are more clearly deducted," during a period of several years.

Second, the Derense Department "must reform and streamline the research, development, and procurement process." The report commuses that the Pentagon "must aggressively move toward more commer-

cial business practices and standards."

Third, the government must develop a coordinated set of policies that will "allow the efficient rationalization and functioning of the munitions industry." These policies should include a "suitable application of antitrust laws."

The report's fourth recommendation deals with rewarding commercial sector investment in munitions research and development and

value-based contracting.

Another recommendation calls for closely reviewing sales by the Pentagon of excess ammunition to "end the counterproductive competition with potential commercial opportunities." (National Defense, February 1994, page 33). The report suggests that constraints placed on the munitions commercial industrial sector in making international sales should be removed so long as the transactions serve "U.S. national interests and promote the competitiveness of U.S. industry."

Report From Pentagon Committee Questions Changes to Data Rights

A minority report was submitted by Nick Remolds member of the Defense Department Technical Data Advisory Committee, to Eleanor Spector, Defense Department director of procurement—who also chairs committee.

he report calls for a change in the regulations concerning technical data rights. Revnolds contends the change in technical data rights amounts to a creative accounting giveaway allowing original equipment manufacturers to keep data rights paid for by the taxpavers by charging development to the Derense Department indirectly rather than as a direct experiment.

By indirectiv charging the Defense Department, the original equipment manufacturers would obtain data rights paid for by the taxpayer and assure a monopoly position in the government and commercial market, according to Keynolds. He said that this data, developed at taxpayer expense in the performance of a government contract "should remain available to small outsitesses for the purposes of competition."

Revnolds maintains that there would be "immense business losses by hundreds if not thousands of small businesses, if the changes in

<u>data rights are m</u>ade.

Remaids is president of the Independent Defense Contractors Association and vice president of AeroGlobal Logistics San Antonio, Jevas.

Teaming Created Legal Twilight Zone For Firms Working on Cluster Bombs

Alliant Techsystems, Hopkins, Minnesota, and Aerojet. Rancho Cordova. California, agreed to pay \$12 million after being accused of violating antitrust laws. The two companies had teamed to produce combined effects munitions for the U.S. military.

In 1992, the Army approved a plan for a joint contract to build the weapas. The Justice Department contends that the service did not approve the ring and pricing portions nor did it have the authority to do so. The Defense Department has been pushing companies toward teaming arrangements in the hopes of maintaining a viable commercial industrial base with a minimum of direct government involvement or cost. A hard-line antitrust policy is seen by some legal experts as having a chilling impact on future teaming and merger agreements within the defense industry.

Antitrust concerns ended the proposed purchase by Alliant Techsystems of a significant portion of the Olin Corporation. St. Petersburg, Florida, more than a year ago. Just as Aerojet and Alliant Techsystems are the only companies that make cluster bombs in the United States, Olin and Alliant Techsystems are the only producers of several types of tank ammunition.

AGENCY/ CAPITOL HILL

Senate Seeks Answers to Budget Shortfall and Korean Nuke Crisis

Dr. William J. Perry was sworn in as the new defense secretary, but not before he had to answer Senate inquiries concerning the Pentagon's reported \$30 billion to \$50 billion budget shortfall in the Fiscal 1995 through Fiscal Year 1999 time frame.

Dr. Perry estimated the disparity to be \$20 billion for the out years beyond Fiscal Year 1995. He suggested the only ways to offset the gap would be by modifying budget spending limits, by restructuring programs, and by increasing efficiency through acquisition reform.

In response to widespread concern regarding nuclear weapons proliferation in North Korea, Dr. Perry said the United States—through diplomatic means would seek to prevent North Korea from manufacturing these weapons of mass destruction.

GAO Report Questions Whistleblower Protection, Education on Employee Rights

recent U.S. General Accounting Office (GAO) report points to a high egree of dissatisfaction with the Office of the Special Counsel's handling of federal employees who have sought protection under the Whistleblower Protection Act of 1989.

GAO surveyed 945 employees that sought assistance of the special counsel's office. The bulk of the respondents gave the special counsel's office "low marks for overall performance." More than a third of them gave the office low marks.

The report also said that there needs to be better education of federal employees about "the extent of their rights and protections under the whistleblower statutes and the nature of the compliant process."

GAO recommended that "the special counsel explore the reasons for whistleblower complainant's dissatisfaction with the Office of the Special Counsel process and work with the subcommittee to develop an appropriate strategy for addressing these concerns."

National Lab, Pentagon, and EPA Team Develop New Pollution Detection Device

The Environmental Protection Agency (EPA) is developing protocols for a mobile analytical unit developed at Los Alamos National Laboratory, New Mexico, with Air Force funds.

A Los Alamos official said that the unit can "quickly measure minute amounts of a wide range of chemicals to a level of sensitivity that exceeds EPA standards." The unit uses a portable ion-trap mass spectrom-

SUTUR VALE VOU LIMES, DECEMBER 12, 1993

Small firms battle defense contractors

THE WASHINGTON POST

WASHINGTON — It's a Davidand-Goliath struggle, only this itime the stakes are billions of dolelars of Pentagon contracts, and thoth contestants agree the government is leaning toward Goliath.

resimal factories and machine shops exaround the country. They say the Pentagon is about to impose new rarules that could put many of them gout of business and cost taxpayers examoney.

The Goliaths, the nation's largest indefense firms, say the small firms stare opportunists who use Pentaligon rules to learn the big compancies' technological secrets and immake money off them.

The last round is scheduled for Wednesday, when a Pentagon advisory panel will hold a final meeting before issuing recommendations to Defense Secretary Les Asoin.

Industry and government offiscials say the panel — headed by Eleanor R. Spector, the Pentagon's procurement director — has disimissed almost all the small firms' complaints and will find for the large companies on most issues. Pentagon officials declined comment.

The dispute is this: Who owns the rights to the equipment inside the military's planes, tanks and submarines? Is it the government, which helped pay for the research? Or is it contractors, which spent a fortune developing the technologies?

The law has said for years that if its payer money paid for all the research on some gear, then the United States owns rights to it. That means outsiders can get that information from the government, if it's unclassified. But on most military technologies, companies and the Pentagon share research costs, so ownership questions are legally muddled.

In 1984, after Pentagon scandals about \$5,000 coffee pots and \$2,000 pliers. Congress tried to liver costs for military gear by promoting competition. A series of lives and regulations in the mid-1980s expanded the types of technical information the government could disseminate so companies other than the main, or "prime,"

A new industry of "replicator" firms was born. They comb through contracting publications for news of Pentagon bid competitions, then file Freedom of Information requests for technical data on the desired equipment. Blueprints in hand, the small firms bid on the parts contracts, often underbidding the primes because their overhead costs are lower than the big firms".

Replicators say that if the Pentagon rules against them, hundreds of small factories could go under.

"It's very likely this would put us out of business," said Phillip Rodriguez, president of Aeronautical Systems Inc., a Manassas, Va.-based replicator supplying parts for throttle controls on F-15 fighter jets and gear boxes on Navy helicopters.

Eighteen months after Nicaraguan immigrant Rodriguez founded the firm in 1988, it had 15 employees and revenue of \$3.5 million — all because he obtains other companies' blueprints. He said he feels no guilt about the fact that his firm has almost no expertise in technology or manufacturing but only hires factories to make parts for which he's acquired plans.

"The market grew tremendously," he said, "and the wealth was spread."

Moreover, replicators say that if the Pentagon constricts the flow of data to outsiders, military parts costs will rise. They contend that they've saved taxpayers \$20 billion since 1984; by contrast, allies of the primes say the savings were only about \$2 billion.

Meanwhile, prime contractors say some replicators do shoddy work — and cost the government money — because they don't understand the precise function of the gears, screws, valves and pipes they make.

But the primes' main gripe is replicators are making off with technology the primes spent millions developing.

These are our family jewels." said Joel W. Marsh, government acquisition director for United Technologies Corp., a large Connecticut-based defense firm.

"If you buy a Ford, you get an operators manual," said Leroy J. Haugh, vice president for procure-

Small Firms Battle Giants Over Defense Dollars

Pentagon Panel Appears Ready to Favor Big Contractors on Information Access Rules

By John Mints

It's a David-and Goliath struggle, only this time the stakes are billions of dollars of Pentagon contracts, and both confectants agree the government is learning toward Goliath.

The Davids are hornireds of small factories and machine shops around the country. They say the Pentagon is about to impose new rules that could put many of them out of business and cost taxpayers

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Contractors Battle Over Information

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Matthew Forelli, co-owner of a New York firm that makes military aircraft gram, said that if he loses the ability to obtain the primes' drawings, 20 of his 45 factory workers and six of his 12

office employees would be laid off.
"No data means no business." Forel-

They contend that they've saved tax-payers \$20 billion since 1984; by contrast, allies of the primes say the savings were only about \$2 billion.

"This will take us back to the early 1980s and before, when we had spareparts abuses," said Nick Reynolds, commer of a Tenas-based firm that advises small Pentagon contractors and a leader in the replicators movement.

"We thought we'd killed that snake called overpriced spare parts."

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Pentagon constricts the flow of data to

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"These are our family jewels," said Joel W. Marsh, government acquisition director for United Technologies Corp., a large Connecticut-based defense firm.

"If you buy a Ford, you get an operators manual," said Leroy J. Haugh, vice president for procurement at the Aerospace Industries Association, which represents large defense firms. "But you don't get all the blueprints to build a Ford in your garage."

Recently the replicators persuaded a few dozen members of Congress to send letters to the Pentagon pushing their case. But the replicators admit they've been out-lobbled by the big firms.

"I feel like a flea," said replicator Forelli, "crawling up the leg of the elephant."

The Hartford Courant

Sunday, November 15, 1992

Parts war: defense giants vs. subcontractor

By ROBERT WEISMAN and MIRANDA S. SPIVACK Courant Staff Writers

A program designed to end military purchases of high-priced hammers and toilet seats is in jeopardy, caught in a David-and-Goliath strugtle between major defense contractors and small companies vying for dwindling defense dollars.

Each side is accusing the other of trying to muck up sales to the Pentagon at a time when such sales are expected to continue their downward trend. The outcome could affect the profits of larger contractors and the survival of smaller ones, including many in Connecticut.

Their dispute, expected to come to a head in Washington next spring, has its roots in a competition-incontracting law passed eight years ago to help the military save money.

The law created the "breakout program" which, for the first time, permitted the Pentagon to buy replacement parts for aircraft, ships and armored vehicles directly from subcontractors rather than from the weapons' prime contractors.

Now that program is under intense scruting, and the outcome could have a great effect on Connecticut companies and jobs.

"The issue pits prime contractors, such as Hartford's United Technologies Corp., which have lost profits on replacement parts, against their own networks of subcontractors, which have developed important new markets with the military.

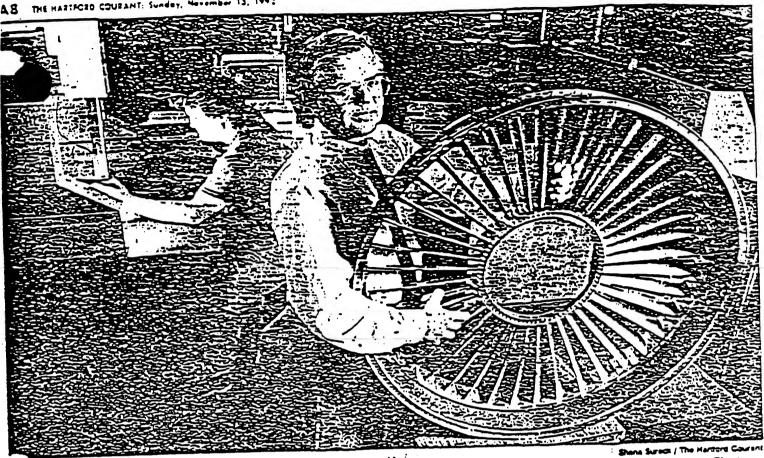
Contractors, sederal officials are reviewing whether to shift control of key weapons design data from the government back to the primes.

The prime contractors insist the proposed changes in regulations, which could be adopted next year, would improve efficiency, and reduce the number of defective parts delivered to the government. But many subcontractors argue the changes effectively would lock them out of a key market—the military—and make them entirely dependent on the prime contractors.

On the surface, the dispute is technical, centering on whether prime contractors or the government should control the design specifications and blueprints for weapons.

But beneath the arcane language, the stakes could not be higher for subcontractors in Connecticut and

Please see Defense, Page A8.



Id M. Judson, president of Electro-Methods Inc., with one of ... hind him, Michael Coulombe Inspects a part Judson says Electroengine parts manufactured at his South Windsor plant Be Timethods does about 75 percent of its business with the military.

Defense firms at odds over contracting rule

Continued from Page 1

across the nation. Simply put, hundreds of toolmakers, machine shops and other small companies fear they could be put out of business if they are denied access to the data.

-- In recent years, the breakout program has saved the government tens of millions of dollars, its advocates maintain. It has also been a boon to subcontractors at a time when the prime contractors have been scaling back on their domestic suppliers and buying more parts from abroad.

They're trying to turn the clock back," said Ronald V. Williams, a Hartford aerospace consultant representing J.T. Slocomb & Co. of South Glastonbury and Numet Machining Techniques of Stratford. They want to go back to a solesource environment that could cost Connecticut thousands of jobs."

The hottest topic

The one knows the full extent of the state's vulnerability because most of the subcontractors clustered around Pratt & Whitney and Hamilton Standard in central Connecticut, or around Sikorsky Aircraft and Textron Lycoming in southern Connecticut work for both prime contractors and the government. As privately held businesses still beholden to the primes, few will speak publicly about their qualms for fear of antagonizing powerful customers.

But the threat to the breakout program has been the hottest topic during the past few weeks at private meetings of toolmakers and government contracting officials in Connecticut and other states. Many have sent representatives to hearings on the issue in Washington and at military bases, while others have sent letters to the committees contemplating changes, to lawmakers and to President-elect Clinton.

Mone of the few who has been willing to talk publicly, Donald M. Judson, president of South Windsor parts-maker Electro-Methods Inc.,

does about 75 percent of his business with the military. This fall, for example, his company won \$10 million worth of contracts from Tinker Air

Force Base to help retrofit jets.

Fludson contends Electro-Methods would be unable to bid on such work: without access to the systems designs, developed by the prime contractors with taxpayer money.

- A-This would put us out of business," Judson said of the proposed changes in data rights. "Four years from now, the government wouldn't be able to get competitive bidding for their parts. They would have to get the parts from the primes."

& Prime contractors, however, despict the issue in terms of efficiency. Gelerbert Fisher, a former Pentagon official tracking the data rights Adebate for the Aerospace Industries Association, a trade group for the fprimes, paints a picture of millions of pages of systems data — components specifications and drawings spread across the country in farflung government repositories.

Few are computerized, so if the Air Force wants to put out bids for replacement parts on a fighter jet, for example, bureaucrats must call around and gather the information from different sites, Fisher said. Meanwhile, the jet may sit idle for

weeks in a hangar, he said.

You need to be able to store and remeve the data in a timely mat-.ter," said Joel Marsh, the Washington-based director of government acquisition policy for United Technologies Corp. Like other prime contractors, UTC has volunteered to store the data for the government at Toperating divisions such as Pratt, Hamilton Standard and Sikorsky. Responsibility for keeping the weapons design data would restore to the prime contractors esormous eleverage over the flow of replacement parts ranging from jet engine

pumps to helicopter gearboxes eleverage the primes had enjoyed for

idecades until the mid-1980s.

Before the Competition in Contracting Act of 1984, almost all parts for Air Force jets, Navy ships and Army tanks were ordered by the services through prime contractors, which would buy the parts from sub-

tractors and mark up their prices reflect administrative costs.

"If you wanted to be in the defense replacement parts business then, you sold to the primes," said J. Michael Slocom, a Falls Church, Va., government contracting attorney who represents subcontractors.

Horror stories

That system dated back to World War II. But it was rocked by the publicized Pentagon procurement scandals of the 1980s. Embarrassed by reports of costly bolts and coffee pots, former Defense Secretary Caspar Weinberger and his allies in Congress passed the new law promoting competition in military contracting. "It was a response to the horror stories," said UTC's Marsh.

Industry officials maintained the high price of parts, while seemingly outrageous, simply reflected the fact that they required specialized tooling and were custom-built in mall numbers to particular specificions, such as the need to withstand intense gravitational pull. But that explanation did not wash with the general public nor its representatives on Capitol Hill.

In the years since the 1984 law took effect, prime contractors have had to turn over their design data to the military systems commands. Subcontractors across the nation, aided by government competition advocates, have forged business ties with the military services.

The services, for their part, have identified parts suitable for competition and developed parts-tracking and cost-accounting procedures.

Because the cost of a weapon reflects many factors, ranging from the price of raw materials to the number of units ordered each year, there is no firm estimate on how much the government has saved through the breakout program. Advocates insist the savings have been substantial, though they say the savings have been partly offset by the administrative costs of the program.

"It's taken a lot of time and effort to get the breakout program off the ground," said Avon a zerospace consultant Luis Chong. Chong said subcontractors throughout the



throughout the E Chong
state are terrified they will lose their
ability to sell to the government. "If
the government loses control of the
specifications, a lot of subcontractors will go out of business," he
wained, "because a lot of them do
work only for the government."

For subcontractors in Connecticut, an aircraft industry hub, the breakout program is especially important. Air Force jet fighters, bombers and other aircraft, even more than ground or naval systems, contain thousands of rotating parts which must be replaced after set numbers of flights. Many of those parts are built in Connecticut and, through bypassing prime contractors, the subcontractors and the government have, in Slocum's words, "split the difference on the profit."

There has been constant tension in recent years between the primes, which continue to own the technical data, and the government, which has rights to it and disseminates it widely enough to make the ownership irrelevant. Almost every year, Pentagon officials have tinkered with procurement regulation clauses in an effort to resolve those tensions.

In the current data rights debate, Congress and the Pentagon each has set up a committee made up of industry and government representatives to examine two aspects of the same issue. Those tracking the issue say the Pentagon likely will propose new regulations before February.

One committee is weighing a proposal to give the government "limited rights" to the data in the belief that prime contractors should be allowed to keep some data proprietary for national security reasons and to accelerate the conversion of military technology to civilian use. The second panel is examining a proposal to shift control of all data back to the primes but require them to use more competitive procedures.

"Under either proposal, the subcontractors would be at the mercy of the primes," Slocum said. "This would shut these folks down."

The prime contractors prefer a system enabling them to retain their data, whether it was developed privately or with partial government funding, and give it up only with a request from the Pentagon.

"If you go into a restaurant and order a meal, you don't get the recipe," Fisher said. "But if you want the recipe, you can go in and bargain for it. If you buy a thousand meals, the chef may throw in the recipe."

The subcontractors are bracing for a battle. "We're absolutely concerned about it," said Kip Brockmyre, chairman of the National Tooling and Machining Association, which represents subcontractors. "If the changes are not acceptable, we'll fight them."

The New (Old) Industrial Policy

the Pentagon to subsidize commercial products is a bad idea

BY ROBERT J. SAMUELSON

THE CLINTON ADMINISTRATION'S LATEST EXCURSION into industrial policy is its most troubling. The Pentagon proposes spending \$587 million over five years to enable U.S. companies to capture 15 percent of the world market for "flat-panel displays." These are used for lanmputers, videogames, advanced instruments—and cocknit ys for jet fighters. The plan is a huge overreaction to a real m: ensuring adequate supplies of vital components. The effort smacks of political grandstanding to show that the a administration is championing U.S. industry and jobs. true that flat-panel displays will be a part of future weapons as—everything from displays in tanks to, possibly, handnapping devices for soldiers—and that there are now no U.S. suppliers. Japanese companies control about 95 perf the \$5.6 billion world market, which is forecast to grow to illion by 2000, according to Stanford Resources Inc., a

ch firm. The Japanese haven't cooperated on se projects, says the Pentagon. The remedy, s to create a new U.S. industry that would exist

y to serve civilian markets.

a is novel. Previously, the Defense Department nanced civilian research and development in ope that military applications might result; wiously it also has supported defense contractive and it it has never before invoked "dual educations—that is, technologies that have n and defense applications—as the reason to lize an entire nondefense industry. It would do rough subsidies that, though granted for R&D. I require companies to build commercial factor practice, they're production subsidies.

one denies that these factories would aim prir at civilian markets. Consider the numbers. sen 1995 and 2000, the Pentagon may buy 15,000 splays annually. By contrast, world production plays now totals 33 million units and should rise

million units by 2000, says Stanford Resources. The U.S. tis about 6.5 million units. Defense needs, then, account for two tenths of 1 percent of U.S. demand in units, though in value the military displays—which cost more because they o be customized for combat conditions—might represent 1

ercent of sales.

White House is plainly eager to use the Pentagon as a e for "technology policy." (That's the newest variant of strial policy.") Not surprisingly, the first suggestion for a flat-program came from Laura Tyson, chairwoman of the Coun-Economic Advisers, who raised it with White House eco-adviser Robert Rubin, according to a Business Week story yson confirms. Rubin then urged the Pentagon, which had mancing R&D in display technology, to study the matter, hnology policy is politically seductive because it appeals to stionalism and Americans' faith in gadgetry. The lesson isn't a Commerce Secretary Ronald Brown, former chairman of emocratic Party. He's sharply expanded Commerce's Additional program that subsidizes projects involving it and an appeal of the program that subsidizes projects involving it wanced materials or computer software. In 1990.

the ATP spent \$10 million. For 1995, Brown wants to spend \$451 million on the way to \$744 million by 1997.

Unfortunately, the popular appeal of technology policy rests

on two widespread misconceptions.

The first is that a few "critical" technologies determine living standards and global economic success. "It's a totally wrong notion," says science specialist Bruce Smith of the Brookings Institution. What matters is a complex mix of many technologies, management practices, work habits, culture and government policies that is too intricate to control. Technology is only one influence. Consider a simple example: airlines. Americans and Europeans fly the same jets; yet, U.S. carriers are vastly more efficient (in 1989, they handled twice as many passengers with only 25 percent more workers).

The second myth is that Japan successfully practices technology policy and that we must follow suit or be shut out of high-tech

industries. True, some Japanese industries have benefited from government aid; so have some U.S. industries. But in general, Japanese government support for R&D is less than ours, reports economist Gary Saxonhouse. Less than 2 percent of nondefense business R&D is financed by government in Japan compared with 22 percent in the United States. And some recent Japanese technology projects have failed badly: notably, high-definition TV.

The point is that, in encouraging new commercial technologies, it's hard for government to improve consistently on the "market," which is simply many companies trying many things until someone discovers what works best. This does not mean that all government projects will flop. But on average, they will waste money, fall prey to political pressure and distort competition. Sadly, business groups don't oppose these boondoggles on principle, because no one wants to offend the White House needlessly and companies that might benefit will "take the money if

companies that might benefit will "take the money if government is dumb enough to give it away," as one lobbyist says. The potential harm goes beyond waste. If America expands its freewheeling subsidies, other countries may do likewise. Indeed, the Clinton administration had global trade rules modified to permit bigger subsidies. Now, the Pentagon is creating a mechanism to transform alleged R&D subsidies into subsidies to build commercial factories. Perversely, this may make it harder for many U.S. companies to plan their investments, because they

won't know whether foreign competitors may be subsidized.

None of this means the Pentagon should ignore flat-panel displays; they are an important technology with military uses. But the response should be less extravagant and more patient. Some U.S. firms are beginning or expanding production; in the future, foreign companies are likely to establish U.S. plants. And in any case, today's tiny U.S. production capacity is still large enough to meet the Pentagon's small needs many times over in an emergency. The situation, in short, is not as desperate as the Pentagon says. The rush to create a commercial industry suggests, as Brookings' Smith puts it, that "they almost forget that the Defense Department has a detense mission."



A few
'critical'
technologies
don't ensure
economic
success

Page 6: DAR Case 91-312 Pentagon Acquisition Reform

Technical Data Rights:

Without doubt the major concern of the Small Business Independent Defense Contractors is access to technical data. Let all understand that this does not involve the PWA 2037 engine - power plant for the C-17 aircraft. Nor is there concern regarding rights for the CFM 56 a joint venture of G.E. and SNECMA which powers the KC-135 tanker aircraft.

Both of these engines were developed with private funds and thus are not in the "public domain" sector the government pays the private businesses for a product.

We are leery of a new category designated "government purpose limited rights" which we believe would be interpreted as an obstacle to small business acquisition of necessary data to proceed with manufacture. It ould appear that efforts to cut the independent out of the international litary logistical support would be exercised under "GPLR".

We envision a retroactive accounting procedure built around indirect costs. It is possible that DoD would apply the GPLR formula to the F100 and F101 engines. We suggest that a grandfather clause be incorporated to preclude this distortion of sound business action of taxpayer funds acquiring full rights when paying for the development of these two engines. In the late 60's and early 70's.

Sincerely,

ELECTRO-METHODS, INC.

Donald M. Judson

President

DMJ:js

FMS Corporation Washington DC Office

Suite 304 1215 Jefferson Davis Highway Arlington, Virginia 22202-4302 U.S.A.

Telephone (703) 416-2577 Telecopier (703) 416-2581 - Telex 248207

August 19, 1994 HAND DELIVERED

Deputy Director Major Policy Initiatives Department of Defense 1211 South Fern Street Arlington, VA 22202-2808

Attention: Ms. Angelina Moy

OUSD (A&T)/DDP

Our: SD94-0392/DC

Subject: Comments on Proposed Rule, DAR Case 91-312

Reference: Proposed Rule Changes to DFAR Supplement; Rights in Technical

Data (Federal Register 10 June 1994)

Dear Ms. Moy:

FMS Corporation is a small business defense contractor that manufactures, develops and supplies tracked vehicle parts, system upgrade kits and assemblies domestically and internationally. Our largest customer by far is the US Army. As a small business that participates in both development and manufacturing, we are in the unique position of having experience in both areas that seem to have polarized the developer versus non-developer positions taken on the \$807 Committee.

Our review of all of the written material available since learning of the Committee's existence in December 1993 and our experience as both a developer and non-developer makes us completely opposed to the proposed changes to rights in technical data contained in reference. Our position does not apply to proposed changes regarding rights in computer software.

The reasons for our opposition to the proposed rule are:

a. The changes facilitate the developer placing items in the mixed funding category and thereby permitting the developer to grant only Government Purpose Rights (GPR) to the government. The proposed rule permits indirect costs to be treated as a contractor contribution to the development, although in most cases a large portion of indirect costs are paid by the government. Without arguing the merits of the change regarding indirect costs, the

point must be made that there is no provision regarding the minimum amount or percentage of contractor cost which must be made against the development in order to permit the contractor to restrict the technical data rights of the government under mixed funding.

Title 10 USC 2320, which was identified as the driver for the Committee's effort, clearly intended in mixed funding situations, that rights in technical data be negotiated except in cases in which the Secretary of Defense determines (on the basis of criteria established in the regulations) that negotiations would not be practical. The current rule provides for negotiation and criteria to be used by the contracting officer, whenever government rights will be limited (DFAR 227.402-72(a)(2)) as required by statute. The proposed rule automatically limits the Government's rights in mixed funding situations without negotiation and does not provide criteria for negotiation as required by statute. The contractor's contribution toward the development can be as little as one dollar (direct or indirect).

The proposed rule's treatment of mixed funding will drastically increase the number of items and systems for which the government receives only GPR, and will encourage changes in contractor accounting systems to permit favorable contractor application of indirect costs. Rather than encouraging creation of new technology with a contractor's own funds, a stated reason for the change, in fact this will be a disincentive to privately funded development, since the contractor will easily be able to show mixed funding with even a token investment in the development. If the proposed rule is to be implemented, it must be modified to require negotiation and provide for a minimum contractor contribution to the development (50 percent recommended) when GPR are claimed because of mixed funding. To comply with Title 10 USC 2320, it should also establish criteria to be used by the contracting officer in negotiating technical data rights.

b. The increased use of GPR will drastically reduce competition from small businesses and eliminate the gains achieved by the "Competition in Contracting Act", PL 98-369, and the Defense Procurement Improvement Act, PL 98-525 of 1984, which were the basis of "breakout". While the proposed rule would appear to protect competition on material for which GPR is assigned, since GPR data can be used for competition only for material purchased by the government, this is very misleading. The government will only be able to provide GPR data to potential US bidders when it solicits bids for the material. This gives the potential bidders as little as 15 days to respond. This is normally not enough time for a small business to determine its capability to manufacture, develop pricing and compete for the work. Effectively this rule will restrict the competition to those that have made the item before and those offshore sources that the developer has prequalified to make the item for them using GPR drawings provided by the developer. This is completely opposed to breakout objectives and procedures which encouraged potential bidders to

obtain unlimited rights drawings from the government to determine what they could make efficiently and be prepared to respond in a timely fashion to the next government bid requirement. Most small business manufacturers rely on this system and expend money, time and effort using this approach. This is the heart of breakout, good business practice and real competition that brings lower prices to the government when it needs them most.

- It makes the developer/OEM the sole source for direct commercial foreign sales not only of complete systems but spares and upgrade kits as well. The increased use of GPR which will result from the proposed rule will effectively deny our friendly foreign nations, which we are encouraging to buy US systems, from for follow-on support spares and upgrade kit. This is a complete reversal of the recent policy competition requirements. change pushed by the OEM to eliminate non-recurring cost (NRC) on direct commercial sales. The previous administration accommodated this long desired change to improve the US competitive position on international system sales. Follow-on support costs are a major factor in development of total cost of ownership when comparing competing weapon systems. The market gains offered by elimination of NRC in foreign commercial sales may be completely eroded by the proposed rule which effectively precludes competition to meet international follow-on support requirements. This change forces the foreign customer to ask why the US can compete its spares requirements, but the international customer cannot. inconsistency in US policy caused by forcing the foreign customer to buy his follow-on requirements from the OEM, or the US Government through the FMS program will not be lost on these They currently routinely seek competition foreign governments. for follow-on requirements and they, like DoD, are under severe budget constraints at this time. The waste of US taxpayers money should also be considered when grant money such as Foreign Military Financing (FMF) is used for a direct commercial sale without competition.
- d. The establishment of contractor data repositories would create a clear conflict of interest by placing the tools of our trade under the control of the largest competitor of the small business manufacturer. It should be noted that under the current system even the Service operated data repositories face significant delays when missing drawings are requested from the system OEM. Consider the responsiveness that would be given to a competitor's request to an OEM repository for drawings. The inclusion in the proposed rule of such an inappropriate concept, even though only permissive, reflects the strength of the OEM representation on the Committee.

In further support of our opposition to the proposed rule, the following observations and examples are offered:

a. The intent of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190) was to provide a balanced Committee. It is apparent from a review of the Committee's report

to the Secretary of Defense, that small business manufacturers were under represented and the large OEM and developers were over represented on the Committee.

- b. The OEM have long sought these changes and repeatedly have been denied. OEM lobbying has been responsible for both legislative initiatives, PL 102-190 and 10 USC 2320, on the basis that the current rule was defective. In fact the rule change is desired to provide additional advantage to the OEM over small business manufacturers.
- c. The proposed rule is one more concession made to the OEM based on protection of the industrial base. (See "Supplemental Views of Certain Industry Members of the 807 Committee".) Unfortunately, the industrial base is equated by many only with the system OEM. Small business manufacturers are an essential part of the US industrial base and in fact are the true manufacturers of most parts and assemblies purchased by the Government and the OEM. Approval of this proposed rule will be at the cost of many small businesses, which are recognized as an essential part of the US industrial base.
- d. Each year thousands of unlimited rights drawings are purchased from the Services by small business manufacturers under the provisions of Department of Defense Directive 5230.25. These drawings enable broader competition and hence lower prices to the US Government. Restricting this access will jeopardize many small business manufacturers' ability to survive. Has any attempt been made to query the Service repositories of technical data to determine how many requests are received each year and how many unlimited rights drawings are provided? This would quantify how many small businesses would potentially be affected by the proposed rule, i.e. the potential cost of the proposed rule to small business manufacturers and our industrial base.
- e. The system OEM already have many advantages over others (primarily their small business competitors and subcontractors). These include:
 - (1) receiving every request for parts or upgrades by virtue of being the System OEM. Others have to find the business and prove they can perform.
 - (2) having more rights in technical data under the current rule than the government, which has paid completely or almost completely for the development.
 - (3) being free to legally mislead potential customers in regard to rights in technical data to the detriment of their competition. Attached is a redacted copy of a letter recently sent by an OEM to a foreign army to eliminate the competition. Note that all technical data at issue was unlimited rights data, purchased from the US Army, for which a US Department of State export license had been issued.

Note also the care taken to be legally correct, but to still mislead the foreign country regarding the ability of the competition to perform. In competing with the OEM, we are continually faced with proving that the System OEM does not own and cannot restrict our use of unlimited rights data provided by the Services. This case makes us wonder how many times we and other small businesses have lost foreign competitions because of similar letters.

- f. The proposed rule places the small business competition in the position of having to go to its major competitor to obtain a license to use GPR data for individual items contained in kits or systems when a few items have been identified as GPR by the OEM. The proposed requirement to provide the OEM notification of customers which have signed Use or Non-disclosure Agreements (227.403-7) gives the OEM further competitive advantage by being made aware of all requirements and the identity of other companies planning to bid on them. This is fraught with anti-competitive problems for the small business manufacturer. The OEM are oriented toward legal action and can well afford taking such The cost to defend against these actions, which are action. sometimes frivolous, can be ruinous to a small business. Right or wrong the fear of legal action can run off the competition, delay the outcome beyond the bid due date, or eliminate the small business from the competition because the customer becomes aware of the possible legal action and does not wish to be involved or delayed. This is the real world in which we operate. Giving the OEM more rights in technical data will worsen this already difficult situation for small businesses.
- g. Although the small business developers have aligned themselves with the OEM on the Committee, there is nothing in the proposed rule that improves their ability to have the OEM exercise their claim for special rights on their item. The existing rule emphasizes the right of subcontractors and lower tier developers to exercise this claim to rights through the prime contractor. Unfortunately, small business developers are anxious to participate in big programs and are easily dissuaded from exercising this right with the system OEM. This is similar to the wide spread practice of the OEM informally letting their suppliers know their displeasure, and the possible business consequences of quoting to the system OEM's competition.

Before closing, a review of the package sent to selected Committees of the House and Senate as required by PL 102-190, which included a copy of the Committee report, also deserves comment in several areas:

a. Reference to small business manufacturers as "replicators" (page 12) or "companies that replicate parts" (page 16) is degrading and is indicative of the disdain in which the Committee and OEM hold this essential element of the US industrial base, that in fact manufacture most parts used by the OEM and the government.

- b. Although a minority report was submitted as required by PL 102-190, inclusion of a thinly disguised rebuttal paper to the minority report signed by several members of the Committee (identified as Supplemental Comments) appears highly irregular for inclusion in the Committee's report. We support the thrust of the minority report, although we are not members of the Independent Defense Contractors Association.
- c. It appears clear from the report that the Services did not see the need for changes, but were overwhelmed by the majority or DoD pressure and agreed to the majority positions as long as they did not perceive any affect on the interest of their Service.
- d. The opinion of the Small Business Administration regarding the impact on small business manufacturers was largely ignored and the actions required by the Small Business Regulatory Flexibility Act, PL 96-54, to perform analyses was not performed. As these changes will heavily impact small businesses, input and comments from small businesses should also be solicited in a small business forum other than the Federal Register. It is clear that the majority of small businesses, who will be impacted the most, were unaware of the pending rule change and the establishment or existence of the Committee and its charter.

We trust that these comments will be helpful in your review of this issue which FMS Corporation considers will have far reaching consequences on the US industrial base.

If there are any questions on these comments, please contact the undersigned at (703)416-2577.

Very truly yours,

FMS Corporation

John M. Manzó/ Vice President,

Washington Operations

JMM/mz enclosure



May 20, 1994

Program Manager

Army Ordnance Department Attn: Chief of Ordnance Vehicle Upgrade Program, Tender The following information is provided concerning drawings submitted for Tender No. is the Family of Vehicles by owner of intellectual property developed for the Under the Berne Convention, to which is a signatory, marking is not required on the drawings to protect or secure a copyright in those drawings. Without proper permission, copying of these drawings constitutes a copyright Infringement in to use has authorized pgrade Tender associated with their response to the authorized any other company in the se drawings for the tender. Please let me know if you need any other information concerning this matter. Very truly yours,

August 3, 1994

Ms. Angelena Moy, OUSD(A&T)/DDP Director Major Policy Initiatives 1200 South Fern Street Arlington, VA. 22202-2808

Re: Pentagon Acquisition Reform DAR Case 91-312

Dear Ms. Moy,

The proposed acquisition changes recommended by the 807 Group and published in the Federal Register Monday June 20th, 1994 are disturbing both as a taxpayer and a women owned small business concern. It is our humble opinion that all the work that has been done by both industry and the government to date regarding cost savings and cost containment will be lost if the Pentagon adopts the 807 Groups recommendations.

We fail to see the logic behind the recommendations made by the 807 Group in that as taxpayers we pay for the development of a system which becomes public property and then transfer the responsibility of the management of the system to the OEM who will have the legal authority to charge the government whatever they feel the market will bear.

To highlight what the current system accomplishes through competition we are presenting a recent experience where the government had a requirement for a specific jet engine part, up until now this item was procured as a sole source item. The OEM presented pricing which was approximately twenty-seven percent (27%) lower than his previous pricing and awards. The competition for this item was furnished by the small business community who had spent their own monies, not the taxpayers, to qualify to manufacture this item and have the opportunity to present a proposal.

It is our opinion that if the 807 Groups recommendations are adopted the results will be a monopoly by the OEMs', that will be reflected by inflated prices for parts and a complete "lockout" of the small business community to bid competitively on all items controlled by the OEMs'.

In closing we strongly urge you to reject the 807 Groups recommendations

Sincerely,

Jean A. Grey

President

FAX COPY EED 0 #34

Michael W. Sales Senior Patent Counsel



Subsidiary of GM Hughes Electronics Building C1 M/S A126 Telephone: (310) 568-7028 Telefax: (310) 568-7834

August 19, 1994

VIA TELECOPIER

Attn: Ms. Angelena Moy, OUSD (A & T) / DDP Deputy Director Major Policy Initiatives Room C109 1211 S. Fern St. Arlington, VA 22202-2808

Re:

DAR Case 91-312

Dear Ms. Moy:

Find enclosed the comments of Hughes Aircraft Company on the proposed rule respecting Rights In Technical Data and Computer Software. We believe the proposed rule has been fair in addressing a number of competing concerns. Our remaining concern is the need to clarify certain areas in the proposed regulations regarding copyright ownership, and simulation, so that there is no question that existing law and regulations are not being changed by the proposed rules. Other comments are basically housekeeping in nature.

Although there are certainly aspects of the rule with which we could take issue, we have kept our comments to an absolute minimum so that our comments are taken as seriously as possible.

We respect the tremendous effort which has gone into the proposed rules. We believe, with these few clarifications, the rules should provide a stable framework by which the contractor community and DoD can address these issues for years to come without the previous friction and uncertainty.

I would be happy to discuss any of these issues over the phone or in person.

We are providing a copy of these comments by FAX and the original separately by first class mail this date.

Sincerely,

Michael W. Sales

Corporate Patents and Licensing

MWS:rarg
cc: T. Snyder
T. Winland
Enclosure

Corporate Offices: 7200 Hughes Terrace PO Box 80028, Los Angeles CA 90080-0028 (310) 568-7200

Comments To DAR Case 91-312 (all references are to DFARS 252 and 252.227-7013)

I. General Comments

- A. We support the new policy in 227.403-4 that rights in technical data for "undeveloped" items components and processes will be determined by the source of funds used to create the data. This provides guidance where there has been a longstanding gap in the regulations and conforms the regulations to commercial practice. This policy should be clearly stated to also apply to "undeveloped" software in 227.5.
- B. Existing DFARS Clauses 252.227-7034, 7038, and 7039 do not appear in the proposed rule. An express comment that these clauses are being deleted or an indication that they are being carried forward would be appreciated.

II. Copyright Ownership by Contractor

Recognition that the contractor owns the copyrights in the existing 7013 "clause", para (e), should be retained in the proposed rule. We recommend that the language in existing 7013, para (e) (1) - (4) be carried forward into the new 7013 clause. We urge that proposed para (d) be rewritten and retitled to address copyrights across the board, not just "Third party copyrighted data". In this regard, the existing copyright "note" in para (e) (4) is of major importance to contractors in that it clarifies that the Government's copyright license is for "reproduction" "by or for" the U.S. Government and thereby defines "Government purposes" under e(1). The proposed rule would arguably omit these e (1) and e (4) limitations, and create the misleading impression in some minds that copyrighted data and software could be reproduced for the benefit of commercial parties or foreign Governments. This does not seem to be the intent of the new rule since no agreement or concurrence in so major a change can be found anywhere in the Committee comments. Further, such a change would be economically damaging to developer contractors who must increasingly depend on foreign markets and commercial application of defense products and software to sustain their economic viability in the current declining domestic defense market.

We thus believe that the proposed para (d) would jeopardize an important incentive to contractors who develope defense technology and increase piracy of data and software in foreign and commercial markets. We strongly urge that the present copyright language in para (e) be retained.

III. Definition of "Government Purpose"

The new definition is too ambiguous.

The proposed rule defines Government purpose as "any activity in which the United States is a party, including agreements, sales or transfers by the U.S. Government" (paraphrased). The current copyright clause (and patent clause at FAR 52.227-12) limit the U.S. Government's license to essentially a license "by or for" the U.S. Government, i.e. United States government purposes. We believe Government purposes should continue to be limited to contracts for the direct benefit of the U.S. Government. As in our previous comment, we believe that the proposed change is significant and would tremendously impact developers at a time when foreign and commercial markets are critical to their economic viability and when these contractors, so critical to our national security, are fighting for their economic lives. Also, why should a contractor be deprived of a competitive edge in the foreign and commercial market, even for unlimited rights data when the U.S. Government has a royalty free license for its own purposes. Again, the Committee comments carry no discussion on this expansion of the definition of "Government purpose" compared to the prior provisions. Accordingly, we believe it was not their intent to make such a fundamental change. We therefore strongly urge that the proposed rule be clarified to limit Government purposes to "contracts or agreements for which the U.S. Government is a party and the end beneficiary".

IV. Definition of "Developed".

We believe the proposed rule should not continue to sidestep recognizing that "development" can be satisfied by computer simulation. Clearly, the proposed rule and the existing rule all recognize that "development" need not rise to the level of "actual reduction to practice". However, under current case law and as the attached legal opinion clearly demonstrates, there is no per se rule against simulation being a reduction to practice. We respectfully urge that the definition of "developed" be revised to indicate that a computer simulation will be considered developed when the item, component, or process, when working, conforms to the simulation except for "minor modifications". We believe this change would recognize the tremendous strides made in simulation and avoid undue friction and litigation based on basic unfairness and denial of commercial reality.

We note that prior to having a working item, component or process, rights in relevant data will be determined based on source of funding (227.403-4).

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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April 14, 1994

Via Facsimile

Michael W. Sales, Esq. Senior Patent Counsel Corporate Patents & Licensing Hughes Aircraft Company 7200 Hughes Terrace Post Office Box 80028 Los Angeles, CA 90080-0028

William C. Schubert Santa Barbara Research Center 75 Coromar Drive Goleta, California 93117

Actual Reduction to Practice By Computer Simulation In Government Contracts

Dear Mike and Bill:

You have asked us whether a computer simulation of an invention can constitute an actual reduction to practice for the purposes of determining whether the invention is or is not a "Subject Invention" under FAR 27.303(a).

The issue you have raised is a novel one which no court has directly decided. It is thus not possible to predict with certainty what a court would hold. However, properly instructed, a court should hold that a computer simulation can constitute an actual reduction to practice for the purposes of FAR 27.303(a) and FAR 522.227-12(a)(6), provided there are adequate indicia that the computer simulation reliably demonstrates the workability of the invention for its intended purpose.

Background I.

Chicago

According to Federal Acquisition Regulation ("FAR") 27.303(a)(1), all Government contracts must contain a "Patent Rights Clause" granting the Government a royalty-free license under patents for "Subject Inventions" developed in connection with the contract:

> The contractor may retain the right, title, and interests throughout the world to each subject invention... [but] the Federal Government shall have a non-exclusive, nontransferable, irrevocable, paid up license to practice or have practiced for on behalf of

> > New York

Washington D.C.

Michael W. Sales, Esq. William C. Schubert April 14, 1994 Page 2

the United States the subject invention throughout the world.

FAR 52.227(b).

"Subject Invention" is defined in the regulations as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under th[e] contract; . . . " FAR 52.227-12(a)(6).

You have posited the following hypothetical situation: Hughes simulates a novel and unobvious invention on a computer prior to the execution of a Government contract. The invention is actually built for the first time after the contract is executed. The invention, upon being built, works for its intended purpose as predicted by the computer simulation with only minor modification, if any.

The issue is whether the computer simulation would constitute a first actual reduction to practice such that the invention is not a Subject Invention under the Patent Rights Clause.

II. Discussion

A. Actual Reduction To Practice In General

The Federal Circuit has held, in the context of the Patent Rights Clause in Government contracts, that reduction to practice occurs "'when it is established that the invention will perform its intended function beyond a probability of failure,' so that whatever minor adjustments thereafter required may be considered mere perfecting modifications." Hazeltine Corp. V. United States, 820 F.2d 1190, 1196 (Fed. Cir. 1987) (quoting McDonnell Douglas Corp. v. United States, 670 F.2d 156, 161 (Ct. Cl. 1982)). However, if subsequent changes are necessary that are of "critical importance to achieving the objectives of the invention," then reduction to practice has not been shown. Leesona Corp. v. United States, 530 F.2d 896, 910 (Ct. Cl. 1976).

The Federal Circuit imposes a "rule of reason" standard in the determination of whether an actual reduction to practice has occurred. Holmwood v. Sugavanam, 948 F.2d 1236, 1238 (Fed. Cir. 1991). This rule requires the fact finder to "examine,

Michael W. Sales, Esq. William C. Schubert April 14, 1994 Page 3

analyze, and evaluate reasonably all pertinent evidence" relating to an alleged actual reduction to practice. <u>Id</u>. at 1239.

Testing of an invention under its actual intended operating conditions is not required. The Court of Claims has held that

[i]n assessing the evidence bearing on a reduction to practice question, an impossibly high standard should not be exacted; rather, the practicalities of the situation must be assessed and a determination made as to whether, under the circumstances, the tests conducted were sufficiently comprehensive to demonstrate the workability of the device.

Bendix Corp. v. United States, 600 F.2d 1364, 1370 (Ct. Cl. 1979).

Thus, "tests performed outside the intended environment can be sufficient to show reduction to practice if the testing conditions are sufficiently similar to those of the intended environment." DSL Dynamic Sciences, Ltd. v. Union Switch & Signal, Inc., 928 F.2d 1122, 1125 (Fed. Cir. 1991) (testing of railroad coupling for caboose adequately simulated by tests on freight car). See also, e.g., Williams v. NASA, 463 F.2d 1391, 1399 (CCPA 1972) (laboratory testing of invention intended for use in space adequately demonstrated workability of device for intended purpose); Eastern Rotocraft Corp. v. United States, 384 F.2d 429, 431 (Ct. Cl. 1967) (ground testing of cargo net intended for use in airplane adequately demonstrated workability of invention).

The purpose of the actual reduction to practice requirement in the Patent Rights Clause is to provide the Government rights where it funded the development of the invention. McDonnell Douglas Corp. v. United States, 670 F.2d 156, 163 (Ct. Cl. 1982) ("One major aim of the Subject Invention provision is to protect the Government from having to pay for using an invention which it significantly helped to develop.") Generally, where the Government has borne the risk of demonstrating the invention's utility for its intended purpose, it is entitled to the right to practice the invention without compensation to the contractor. On the other hand, where the (continued...)

Michael W. Sales, Esq. William C. Schubert April 14, 1994 Page 4

B. Actual Reduction To Practice By Computer Simulation

1. Precedent Wherein The Issue Was Raised

Properly interpreted, the foregoing authority establishes that if there are sufficient indicia that Hughes' computer simulation reliably demonstrates that the invention will work for its intended purpose "beyond a probability of failure," then a properly instructed court should hold that an actual reduction to practice occurred when the invention was simulated on computer.

We have located only one case that has considered the issue of whether a computer simulation can be an actual reduction to practice. In McDonnell Douglas Corp. v. United States, 670 F.2d 156, 161 (Ct. Cl. 1982), the patented invention comprised a flight guidance logic system for an antitank missile. McDonnell had simulated the flight guidance system on computer prior to the execution of a contract with the Government. The missile was not actually built and flown until after the contract was in force.

McDonnell argued that the patented invention was not a Subject Invention under the Patent Rights Clause because the computer simulation constituted an actual reduction to practice prior to the contract. The Court of Claims did not directly decide whether a computer simulation could ever constitute an actual reduction to practice under FAR 52.227-12(a)(6). Rather, the Court held, on the facts of the case before it, that no actual reduction to practice could have taken place prior to the contract because actual flight testing of the missile demonstrated "significant flaws" in the design of the flight guidance system. These flaws conclusively demonstrated that the computer simulation was inadequate to prove the workability of the invention for its intended purpose. Id. at 161. Thus, the Court stated that "[t]ests which fail to simulate the varying and

^{1 (...}continued) contractor has borne the risk of development, the contractor is generally entitled to compensation for use of the invention by the Government. Cf. Dowty Decoto, Inc. v. Dept. of the Navy, 883 F.2d 774, 778-79 (9th Cir. 1989) (item was "developed" by contractor when contractor took the risk of investing money to transform the invention from a speculative idea into a workable item).

Michael W. Sales, Esq. William C. Schubert April 14, 1994 Page 5

multiple conditions of the invention's intended environment will not serve to prove the operability, stability and reliability of the invention for practical use." Id. at 162.

The trial division of the Court of Claims, in McDonnell Douglas, did discuss without deciding whether a computer simulation could be considered an actual reduction to practice. In dicta, the Court stated that, "there is no valid basis for refusing to accept computer simulations as the full legal equivalent of an actual reduction to practice." McDonnell Douglas Corp. v. United States, 208 USPQ 728, 733 (Ct. Cl. Tr. Div. 1980). The full Court of Claims did not comment on the trial division's statement in the course of its review. The statement does suggest that a court is likely to endorse the argument that a computer simulation could be considered an actual reduction to practice in appropriate circumstances. 2

2. Application Of Precedent To Computer Simulations

The reasoning in the <u>McDonnell Douglas</u> cases (both the trial decision and appellate decision of the Court of Claims), combined with the general legal principles discussed in part II.A, <u>ante</u>, indicates that a properly instructed court should hold that Hughes' computer simulations constitute an actual reduction to practice, provided there are adequate indicia that the computer simulation reliably demonstrates the workability of the invention for its intended purpose. However, because no court has directly addressed the issue, it can not be said with certainty that a court would so hold.

One persuasive indicia of reliability is whether subsequent testing of a physical embodiment of the invention verifies the predictions made in the computer simulation that the invention will work for its intended purpose without

In addition, a recent Federal Circuit case, <u>Sewall v. Walters</u>, No. 93-1230, Slip Op. at 11 (Fed. Cir. Apr. 7, 1994), held that a successful computer simulation of an invention, which verified the operability of the inventor's postulates, supported a holding of a conception prior to the date of the simulation. The issue of whether the computer simulation supported an actual reduction to practice was not before the Court. However, the Court's reasoning may indicate some level of judicial acceptance of computer simulations as evidence on invention issues.

Michael W. Sales, Esq. William C. Schubert April 14, 1994
Page 6

modifications of "critical importance to achieving the objectives of the invention." It is also important that the computer simulation mimic the varying and multiple conditions of the invention's intended environment.

If the computer simulation mimics the invention's intended environment and subsequent physical testing verifies the simulation, then a properly instructed court should hold that the computer simulation constituted an actual reduction to practice of the invention.

If subsequent modifications are necessary to make the invention work, the determination of whether a computer simulation is a reduction to practice will turn on whether these modifications are in the nature of "mere perfecting modifications." If the modifications are mere perfecting modifications, a properly instructed court should still hold that actual reduction to practice occurred during the computer simulation.

On the other hand, if subsequent testing of a physical embodiment of the invention indicates that critical modifications must be made to the embodiment that had been computer simulated, then a court would likely hold that the computer simulation did not prove that the invention was workable for its intended purpose and therefore did not constitute an actual reduction to practice.

In a close case, a court would probably entertain and consider expert testimony on the issue of whether any subsequent modifications were of "critical importance" or whether they were "mere perfecting modifications."

C. The Physical Embodiment Requirement

Language exists in some older cases that a court may interpret as holding that an actual physical embodiment of a device is a prerequisite for a holding of an actual reduction to practice. See, e.g., Eastern Rotocraft Corp. v. United States, 384 F.2d 429, 431 (Ct. Cl. 1967) ("Reduction to practice occurs when the workability of an invention can be demonstrated. Workability means that a physical form of the invention has been constructed which functions.") However, if properly instructed, a court should not regard this authority as requiring a per se requirement that a physical embodiment must always be constructed

Michael W. Sales, Esq. William C. Schubert April 14, 1994 Page 7

to show an actual reduction to practice for at least four reasons.

First, in <u>Eastern Rotocraft</u> and other cases containing similar language, the courts were not presented with the facts posited here; <u>i.e.</u>, a computer simulation coupled with sufficient indicia that the simulation reliably demonstrates the workability of the invention for its intended purpose. While statements that go beyond the issues presented in prior cases may be respected, the Federal Circuit has stated that such statements do not control later decisions where the issue is actually presented to the court. <u>Mallinckrodt</u>, <u>Inc. v. Medipart</u>, <u>Inc.</u>, 976 F.2d 700, 708 n. 8 (Fed. Cir. 1992).

Second, later case law indicates that the Federal Circuit does not favor rigid, per se rules in the reduction to practice analysis. The Federal Circuit favors a "rule of reason" test, which requires the fact finder to "examine, analyze, and evaluate reasonably all pertinent evidence" relating to an alleged actual reduction to practice. Holmwood v. Sugavanam, supra. The Federal Circuit's adoption of a rule of reason test cautions against application of any per se rules relating to actual reduction to practice. Moreover, the Court of Claims' prohibition in Bendix Corp. v. United States, supra, against an "impossibly high standard" in view of the "practicalities of the situation" suggests that a physical embodiment is not required in appropriate circumstances.

Third, in <u>McDonnell Douglas</u>, wherein the issue of computer simulation was raised, the Court of Claims did not decide the case merely by reference to a <u>per se</u> rule requiring a physical embodiment. The Court's analysis suggests that a computer simulation could be considered an actual reduction to practice as of the date of the simulation. See section II.B., ante.

Fourth, as recognized by the Court of Claims Trial Division, technology has become increasingly reliant on computers to forecast, as well as verify, operations of highly sophisticated equipment. McDonnell Douglas, 208 USPQ at 733. The Court's recognition of this fact is even more true today than it was fourteen years ago when the Trial Division's opinion was issued.

Michael W. Sales, Esq. William C. Schubert April 14, 1994 Page 8

Thus, a properly instructed court should not impose a rigid, <u>per se</u> requirement that a physical device be constructed as a prerequisite for a holding of an actual reduction to practice.

III. Conclusion

The hypothetical situation you have raised presents a legal issue of first impression. It is thus not possible to predict with certainty what a court would hold.

However, in the hypothetical situation that you posed, wherein the physical embodiment of the invention works as the computer simulation predicted, and the computer simulation accurately simulated the environment of the invention, a properly instructed court should hold that an actual reduction to practice had taken place as of the date of the computer simulation.

Please do not hesitate to call if you have any questions or comments.

Very truly yours,

KIRKLAND & ELLIS

By:

Philip C. Swain

#16 8/194

Integrated Dual-use Commercial Companies

CHAIRMAN Frank Abbott Du Pont TEL: (302)733-8801 FAX: (302)733-8844

August 10, 1994

Ms. Angelina Moy DUSD (A&T) / DDP 1211 South Fern St. Arlington, VA 22202-2808

Dear Ms. Moy,

This letter is forwarded on behalf of the Integrated Dual-Use Commercial Companies (IDCC) providing comments on DFARS Case 92-D010, the proposed rule to amend the DoD Federal Acquisition Regulation Supplement (DFARS) subpart 227.4 "Rights in Technical Data" and the corresponding clause DFARS 252.227-7013.

The IDCC is a consortium of large commercial companies. Its members are Alcoa, Corning, Cummins Engine, Dow Chemical, Dow Corning, DuPont, W.L. Gore and Associates, Hoechst Celanese, Honeywell and 3M. The IDCC believes that comprehensive changes are necessary in the acquisition process to allow the government and its prime contractors to purchase commercial products and services from commercial companies. The pending acquisition reform legislation is expected to address some of the barriers that currently inhibit commercial sales to the government. Regulatory reform of data rights is also essential. As product and data developers, IDCC member companies invested approximately \$4.7 billion in R&D in 1993. Products or processes developed through this investment must be protected. Applicable technical data must be restricted from release or disclosure to others, since the products, processes and data represent the "life blood" of a commercial company's ability to compete on the world market.

The IDCC generally supports the positions taken by the Government - Industry Technical Data Committee in its report to the Secretary of Defense. Our comments on the policy issues that the committee identified as significant are as follows:

a. <u>Basis for Allocating Data Rights</u> - IDCC members believe strongly that the data creator owns the data and should have the exclusive right to license others. Clearly, this is the case where the data was developed through private funding. Where the government has fully funded the product or process, the government

should be able to receive data rights licenses that are needed consistent with its objectives. Where funding is mixed, appropriate licenses could be negotiated. However, it should be recognized that commercialization of products is served by allowing product or process creators to exclusively market technology created through private, government or a mix of funds. It should be recognized that commercial companies often invest substantial funds over many years to develop technology positions. This primary part of technology must be recognized. The position taken by the committee is acceptable if it is clear that government rights in data flow from a license granted by the data creator.

- b. <u>Definition of "Developed"</u> IDCC does not believe the current definition in regulations, using the concepts of existence and workability, are consistent with modern design and development practices. Computer aided design and manufacturing techniques often eliminate the need to reduce designs to practice and construct physical demonstrations to prove workability. Therefore, we believe that the use of automated design techniques should be permitted to substitute for the existence test, where it can be determined that simulation provides reasonable assurance that the item can be built.
- c. <u>Background Systems/Engineering Systems</u> The position taken by the committee whereby the expense definitions and treatment of indirect costs, which permit background and engineering systems to be considered items developed exclusively at private expense, is acceptable. Background systems, engineering systems and the intellectual property of commercial developers must be protected in order to encourage the availability of resultant products or services to the government.
- Expense definitions and indirect costs. The existing criterion of "Required for d. performance", which allows the government to claim unlimited rights in data for products developed at private expense with concurrent performance occurring under a government contract, is inconsistent with other statutory and regulatory requirements and is not acceptable. In addition, the current criterion allows the government similarly to claim unlimited rights where private funds were used by a subcontractor to develop a product that was necessary in performance of a contract or subcontract. The documented committee discussion on this issue was on the mark, where it was concluded and recommended that this " required for performance" criterion should be eliminated as the basis for the government claiming unlimited rights. The committee position where all non-government funds are considered private expense is clear and appropriate. Where mixed private and government funding is involved, the IDCC agrees that the DFARS clause 252,227-7013, "Rights in Technical Data and Computer Software" should be updated to reflect the concept of mixed funding.

With regard to the treatment of indirect expenses, IDCC strongly believes that all indirect expenses represent the allocation of private funds and should be considered private expenses. The Cost Accounting Standards preclude

inconsistent cost charging. The committee position in the work product advocating that costs allocated to indirect cost pools should be considered private expenses is appropriate.

e. <u>Data Rights under Mixed Funding Situations</u> - 10 USC 2320 requires the government and its contractors to negotiate rights in data developed at mixed expense. The experience of member companies is that too often government contracting officers demand unlimited rights in these situations. While the issue gets resolved, it often takes months of discussions and negotiations. The government contracting officer's position of demanding unlimited rights and refusing to accept a license is inconsistent with statute and leads to the lack of confidence that a commercial supplier's rights will be protected from use by others.

The committee work product recommendation for adoption of government purpose rights for a nominal 5 year period commencing with the award of a contract to the data developer is acceptable conceptually, as long as provision is also made for negotiation of other than a 5 year baseline where appropriate. The purpose is to protect the rights of the product, process and data developer in its pursuit of commercialization. It must be recognized that the process of commercialization cannot be tied to a 5 year period but must reflect the specific circumstances associated with the contract, subcontract and product. In many cases the committee position for a 5 year period will not be appropriate and this should be recognized up front. We would also suggest for consideration changing the start date from contract award to contract completion.

- f. Commercial Items IDCC members have very serious concerns with the provisions of 10 USC 2320 that permit the government to use or disclose form, fit or function data for commercial items. The disclosure of commercial data can impact a company's commercial business. It is strongly recommended that the existing DFARS 211 technical data requirements be replaced with a policy requiring the negotiation of specific license rights in conjunction with commercial items and that the policy prohibit the release of any commercial product data without the developer's concurrence. Normally, the government should not seek data beyond that which is customarily provided to commercial customers.
- g. Separate Treatment for Computer Software The committee's work product, which proposes to separate computer software and computer software documentation from technical data requirements and further distinguishes between commercial and non-commercial software provides a reasonable approach to protect the interests of commercial companies.
- h. <u>Copyright Considerations</u> IDCC members do not believe the committee work product position combining the copyright and data rights licenses will necessarily clarify current regulations. Since the rights intended to be conveyed by data rights

and copyrights licenses are frequently not the same, it is recommended that the rights be separately identified in appropriate regulations.

- i. Marking Requirements IDCC members strongly oppose the "mark or lose" provisions contained in current regulations. The inadvertent absence of a marking should not change the reasons for which data was provided, such as government purpose rights. Continuation of these requirements places a burden on industry, especially commercial companies, to ensure that every piece of data is appropriately marked. Where commercial companies have provided data on commercial products, it is strongly recommended that controls be established to consult with the data creator prior to the release of data that is not marked to preclude inadvertent release.
- j. <u>Contractors as Technical Data Repositories</u> IDCC member companies support the committee work products approach whereby the government maintains data repositories but allows the establishment of contractor data repositories when consistent with defense agency procedures. One of the circumstances in which commercial data repositories should be considered is for commercial products or processes, whereby the data developer would be the data repository and paid for performing the service.

The IDCC position on computer software is consistent with the position on each data rights issue discussed above.

The Government - Industry Technical Data Committee recommendations as discussed in its report, will provide significant improvement to current regulations on data rights. However, it is also important that efforts be made to provide training to government technical, program and contracting personnel with regard to data rights. As commercial firms, IDCC members often face demands for unlimited rights, without the requester being able to articulate why the government needs those rights. In the interest of promoting the use of commercial products, government personnel should request only those rights which are needed. These rights must be obtained through appropriate licenses. The regulations should clearly provide this guidance to contracting officers.

We thank you for the opportunity to comment on the Government - Industry Technical Data Committee report.

Sincerely,

Frank Abbott

W fllott

Chairman



Record 8/4

August 5, 1994

Deputy Director Major Policy Initiatives 1200 S. Fern St. Arlington, Va. 22202-2808 Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Reference: DOD Proposed Rules, Rights in Technical Data; DAR Case 91-312.

The Independent Defense Contractors Association represents the interests of many small companies that must rely on Government-provided technical data in order to manufacture spare parts for the Department of Defense. In our opinion, the proposed language that will govern how technical data will be acquired by the Government and made available to "non-developers" will effectively deny our members the opportunity to continue to do business with the Government. It is no secret that the Original Equipment Manufacturers have a concerted agenda to re-capture the spare parts market in light of the down-sizing of major weapon systems programs. For the past three years, we have observed several initiatives on the part of OEMs to influence legislation and regulation that would make it more difficult for DOD to maintain a competitive environment for spare parts. Proposed data rights changes are merely one of several priorities which, if enacted, will become a welcome reality for them.

The areas of the proposed language that we find particularly objectionable are discussed below.

Under DFARS 227.403, "Noncommercial items or processes", and the clause at DFARS 252.7013, "Rights in Technical Data - Noncommercial Items", DOD would continue to be entitled to unlimited rights in data

developed entirely at Government expense. DOD would, however, no longer be entitled to unlimited rights in data required for the performance of a Government contract. Moreover, DOD's technical data rights would turn in large part upon whether development is charged to DOD as a direct or indirect cost — a potential source of significant abuse. For example, let's address the potential impact of the Section 807 committee proposal to treat development charged to the Government as an indirect expense to be paid for at "private expense". By deeming development paid for with Government funds as being "private expense", DOD would sanction the use of creative accounting to eliminate competition. Data rights would be determined based upon whether development is charged to DOD as a direct or indirect charge, rather than whether it is paid for by DOD. This is of great concern because:

- most engineering development expenses can be charged indirect;
- design engineering may be chargeable indirect;
- accounting systems can be structured to eliminate competition; and
- DOD underestimates the OEMs desire to regain the spare parts market.

The easiest way for an OEM to assure itself of noncompetitive awards would be to charge development expenses such as manufacturing production and engineering expense (MP&E) to the taxpayer as an indirect cost. After all, M P & E is recognized in the form for CASB disclosure statements as an indirect cost, and most OEMs' already charge M P & E indirect. The potential for abuse is apparent when one remembers that most drawings provided by DOD for purposes of competing for aircraft spare parts require additional information to comply with OEM manufacturing processes. Examples of these OEM manufacturing processes are nondestructive inspection, heat treating, welding, etc. It is extremely difficult and in many cases impossible to obtain source approval from the military without the OEM manufacturing processes and the right to use them.

The OEM manufacturing processes referenced on drawings for military parts are the same as those used for commercial aircraft. Therefore, it would appear that either they may have been or could be:

- developed with M P & E, charged to the Government as an indirect expense, or;

developed at private expense, although development was required for the performance of a Government contract.

In either case the proposed revisions would deprive sources — other than the OEM — of essential data needed to compete. Even companies that manufactured the part for the OEM would be out of luck. If they had OEM manufacturing process data they could be precluded by limited rights legends from using it for direct Government work. The role of manufacturing processes in creating competition is significant.

The loophole could be used to preclude competition not only for parts for new weapon systems, but also for parts that have been competitively purchased for many years. OEMs manufacturing processes are constantly undergoing revision. An insignificant revision charged as indirect expense would result in a missing link that prevents alternate sources from competing. Under the proposed revision. OEM's could corner the market by charging minor revisions to the Government as indirect expenses. DOD would not obtain unlimited data rights even if the development reflected in the revision was required for performance of a Government contract.

Moreover, even though only a portion of development is claimed to have been at private expense, the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (see DFARS 227.403.5(b) as opposed to unlimited rights unless otherwise negotiated under existing regulations. Under the proposed regulations, an OEM would be able to limit DOD to GPR data by paying for (or charging as an indirect cost) an insignificant portion of development while the DOD funds the rest. Although a competitor could use GPR data to compete for DOD contracts, it could not use it to compete for commercial or direct foreign government sales (see recommended DFARS 252.7013)1)(11), (12). Competition on DOD procurements would also be limited under the Committee's recommended changes because there is no mechanism in place or provided for to permit potential competitors timely access to GPR data. Specifically, in order to compete, alternate sources need access to pertinent technical data before a solicitation is issued to obtain necessary

source approvals and to submit a timely bid or proposal. The absence of competition will increase costs to commercial and foreign government buyers. Since many direct foreign government sales are funded with U.S. grant or aid funds, the Committee's recommendations would correspondingly increase costs to the U.S. taxpayer.

In summary, while we have objections to many of the proposed changes, we are most concened about the language that permits the treatment of indirect costs as a private expense. Our recommendation is that the existing language of the 1988 interim regulation be allowed to govern how costs (whether direct or indirect) affect the question of data rights.

Wendy Allen

Vice-President, Government Affa irs

#30 8/2199

Jo-Bar Mfg. Corporation

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Manufacturers of Aircraft Fittings

Hydraulic Assemblies

August 15,1994

Deputy Director Major Policy Initiatives 1200 S.Fern St.
Arlington, Va. 22202-2808

ATTN: Ms.Angelene Mov OUSD(A&T)DDP

Subject: Procurement Reform DAR Case 91-312

Dear Mr. Chairman:

Congress is reviewing reform measures S.1587, H.R. 2238, H.R. 3586, H.R. 4263 and H.R. 4328. While we agree that the procurement system is complex, it took many years to accomplish the many good features and opportunities for small business, women-owned business and minority firms.

- 1. A critical component of procurement reform increases the small purchases value from \$25000.00 to \$100,000.00. Small firms will be hurt if these purchases are not adequately publicized in the Commerce Business Daily or the electronic equivalent. If it is not adequately publicized, small firms would be precluded from bidding; this reduced competition would raise the governments procurement costs.
- 2. Maintaining the small business smaller purchase reserve for purchases less than \$2500.00 is the bread and butter of many smaller operations. While we agree that the paperwork should be minimal, this reserve is very necessary because these firms are often not able to compete for larger federal acquisitions.
- 3. The requirement for detailed reporting for any purchase of \$10,000.00 or more is necessary to measure the regults of increasing the threshold.
- 4. The linking of the small claims procedures to the simplified acquisition threshold from \$10,000.00 to \$100,000.00 would allow a more efficient process.
- 5. The Defense Acquisition Pilot Program and the proposed waivers include eliminating small business set-asides, purchase reserves, and, small disadvantaged business subcontracting. We oppose these proposals, as they not only eliminate specific opportunities for small business, but, add to the convenience of established close relationships in the administration. Waivers of statutes should not be undertaken so casually, and, we oppose blanket authority given to the Administrator of OFPP.

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Page 2

- 6. We oppose the allowing of individual agencies to establish their own market place acceptance definition. This criteria should be in tune with small business, and, not set standards that are out of reach of many small firms. The COC program is a very successful government initiative that has helped many small firms. It would not be productive to allow development of procedures that would cancel the intended purpose of the COC program.
- 7. The development of technical data information, and, whether the development cost was charged and paid for by the DOD as a direct or indirect charge, should be determined available for competitive purposes, in the interest of small business and greater competition and reduced government costs. A careful analysis of the impact on small manufacturers must be made.

While reform efforts to simplify the procurement process are endorsed, we feel it must not be carried on the shoulders of small business.

Very truly yours,

JO-BAR Mfg. Corporation

Alex Masley, Sec. Treas

AM:1c

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September 9, 1994

Ms. Angelena Moy OUSD (A&T)/DDP Deputy Director/Major Policy Initiatives 1200 South Fern Street Arlington, Va. 22202-2808

Re:

DAR Case 91-312

Dear Ms. Moy:

Enclosed are comments concerning the above-referenced amendments to the Defense Federal Acquisition Regulation Supplement (Rights in Technical Data).

Sincerely

Ronald K. Henry

PROVIDING COMPUTER SOFTWARE AND DOCUMENTATION TO FOREIGN PARTIES AND INTERNATIONAL ORGANIZATIONS

The proposed amendments to the Defense Federal Acquisition Regulation Supplement (Rights in Technical Data) grant the government "government purpose rights" in computer software developed with mixed funding.

"Government purpose rights" entitle the government to release or disclose computer software and documentation outside the government and to authorize persons to whom release or disclosure has been made "to use, modify, reproduce, release, perform, display, or disclose the software or documentation <u>for United States government purposes</u>." 252.227-7014(a)(11) [Emphasis supplied.]

The term "government purpose", however, is defined as "any activity in which the United States Government is a party, including cooperative agreements with international or multinational defense organizations or sales or transfers by the United States Government to foreign governments or international organizations." 252.227-7014(a)(10) [Emphasis supplied.]

The proposed rule also expressly provides that, subject to Federal export controls and other national security laws and regulations, the Department of Defense may release or disclose computer software or documentation in which it has obtained "unlimited rights" to foreign governments, foreign contractors, and international organizations. Where the government has

obtained software "for which restrictions on use, release, or disclosure have been asserted" release and disclosure in connection with foreign contracts is still permitted, but only if the intended recipient has agreed to be bound by U.S. government regulations governing the use, release, or disclosure of restricted data. 227.503-16.

There are no other stated conditions on transfers to foreign buyers. For example, there is no express requirement that the government consider the impact of the transfer on the domestic defense industrial base, nor is there any express requirement that the government charge foreign users for access to licensed software.

Therefore, whether software and documentation is obtained with "government purpose rights" or "unlimited rights," the U. S. government may assert the right to transfer it directly to foreign governments or to others for the use of foreign governments -- without charge -- and without regard to its impact on the industrial base.

Two concerns are raised by the possible assertion of such rights under these provisions.

First, software and documentation obtained with "government purpose" rights -- purchased at U.S. taxpayer expense for performance of U.S. government contracts -- should be limited to uses by and for the <u>United States</u> government, not foreign governments or foreign corporations.

The justification for "government purpose" rights is to facilitate the use of software and documentation by and within the government, and to promote competition in U. S. government procurements -- not to subsidize procurements by foreign governments or foreign corporations.

Second, the possible exercise of "government purpose rights" and "unlimited rights" to allow the use of government-acquired software and documentation in support of contracts with foreign governments or foreign corporations not only subsidizes foreign buyers at the expense of the United States taxpayer, but also deprives the software developer of valuable markets. By turning costly software into a "free good," the government destroys its value to the developer and discourages developers from competing for U.S. government contracts.

Any use of this provision to confer a free benefit on foreign buyers, at the expense of U.S. developers who could otherwise sell such software in foreign markets, undermines U.S. export policies and further contributes to our balance of trade deficit. The risk of improper subsidies to foreign buyers and the risk of lost export sales are particularly severe concerns because the proposed rule would convert "government purpose" rights into "unlimited rights" after five years. Such a conversion may encourage the government to assert this authority in support of commercial contracts with no colorable claim to a "government purpose."

The import of this provision was succinctly explained in "supplemental views" submitted by a group of industry members to the 807 report:

The government, after expiration [of the government purpose rights] receives unlimited rights in the technical data[,] thereby making that data available on a world wide basis. The government members of the committee presented a number of justifications for this expiration, significant among them being the argument that it was an intolerable burden to maintain the security required on government purpose rights for an indefinite period. In addition, the expiration was included to give the spare parts replicators greater opportunity to sell spare parts directly to foreign governments. We believe that these reasons are insufficient to justify an automatic expiration of rights. The period should at least be extended or, preferably, made indefinite to encourage commercialization and provide support for U.S. industry. 807 Report, Supplemental Views of Certain Industry Members, at 4. [Emphasis supplied.]

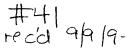
authority to transfer software and documentation to or for the benefit of foreign governments, the exercise of this power should be constrained. At a minimum, the government should charge foreign users the market value of the software and documentation it proposes to transfer. In addition, the Department of Defense should be required to consult with the Department of Commerce before authorizing any such transfer, in order to assess the impact of the transfer on the defense industrial base, U.S. balance of payments, and U.S. trade policy.

Although the government could, on its own initiative, refrain from asserting the right to give away software and documentation in support of foreign contracts, amendment of the

rule would provide firm guidance to agencies and contractors alike. In either event, in the implementation of these rules, the use of government-held licenses to subsidize foreign government purchases is a waste of limited and valuable resources, and contrary to sound trade policies.

Therefore:

- (A) the exercise of "government purposes" licenses should be limited to uses by and for the <u>United States</u> government;
- (B) the transfer of software and software documentation by the U.S. government at less than fair market value to or in support of a contract with a foreign buyer should be prohibited unless the Agency head states that the transfer is necessary to the national security interests of the United States, with a presumption against such a finding in any case in which the copyright holder is willing to contract with the foreign buyer for purchase of the software and documentation at fair market value; and
- (C) consultation with the Department of Commerce should be required before authorizing any transfer of software or software documentation at less than fair market value, if the transfer is to or in support of a contract with a foreign buyer in order that the DOC might assess the impact of the proposed transfer on the defense industrial base and U.S. trade policies.



M/A-COM, INC. 1011 PAWTUCKET BOULEVARD P.O. BOX 3295 LOWELL, MA 01853-3295 (508) 442-5000 FAX: (508) 442-4380



September 8, 1994
Via Federal Express No. 1412304946

Deputy Director
Major Policy Initiatives
PDUSD (A&T) DP
Attn: Ms. Angelina Moy
1211 Fern Street, Room C-109
Arlington, VA 22202-2808
Phone: 703-604-5386

Re:

DAR Care 91-312

DFARS Rights in Technical Data

Comments on Proposed Rules of 6/20/94

Dear Ms. Moy:

Reference is made to the DFARS rules on rights in technical data that were proposed in the Federal Register of June 20, 1994. As prime contractor and subcontractor, M/A-COM, Inc., and its subsidiaries ("M/A-COM") have supplied technical data and computer software to the U.S. Department of Defense ("DoD"). M/A-COM is a leading supplier to the wireless telecommunications, surveillance, and defense-related industries of radio frequency, microwave, and millimeter wave semiconductors and components. Currently, one third of M/A-COM's business is for DoD applications. M/A-COM has several comments on the proposed rules. The first two are the most important to us, but we feel strongly about all of them. Our comments are as follows:

- 1. We strongly urge that a single set of data rights clauses be adopted for use by the DoD and the non-DoD agencies of the US Government. M/A-COM is a medium-sized Government contractor. We had total sales of \$340 million in fiscal year 1993, of which between 43% and 50% were direct or indirect sales to the Government. It is disproportionately expensive for a company of our size when compared to larger Government suppliers to have to set up, staff, and implement procedures under two sets of extremely detailed data rights clauses. The penalty if we don't is the potential loss of our data rights to the Government. Whether we do or don't, we are at a very significant disadvantage compared to the many larger Government suppliers.
- 2. We strongly recommend that the complex restrictive marking requirements of proposed rules 252.227-7013(f) and 252.227-7014(f) be deleted and that a single legend be used whenever the Government has less than unlimited rights. The proposed rules have no less than six different legends to use, depending on which of the following rights are granted: (1) government purpose rights in technical data, (2) limited rights in technical data, (3) special license rights in

technical data, (4) government purpose rights in computer software, (5) limited rights in computer software, or (6) special license rights in computer software. Moreover, the appropriate legend must appear (a) on the container or transmittal letter and (b) on every page where the restricted data appears, and the restricted technical data on each page must be specifically identified by circling, underscoring, or noting. There may be more than one type of rights on a given page, requiring two legends and additional specific identification on each such page. This is absurdly complex and burdensome, especially for medium-sized contractors such as M/A-COM. If we fail to comply, the penalty is potential loss of our data rights. Just as under comment no. 1, whether we comply, at disproportionate cost, or we don't, we are put at a very significant disadvantage compared to larger suppliers.

We have three specific recommendations. First, no specific identification by circling, underscoring, noting, etc., should be required. Second, the legend should only be required on the first page of the technical data or computer software. Third, there should be only a single legend to be used, no matter what data rights (less than unlimited) are granted to the Government. A suggested legend is as follows:

RESTRICTED GOVER	NMENT DATA RIGHTS
Contract No	
Contractor Name	
Contractor Address	

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data and/or computer software contained herein, or to permit others to do so, are restricted by the above contract. Any person, other than the Government, who has been provided access to all or any part hereof must promptly notify the above contractor. Any reproduction permitted under the contract of all or any portion hereof must also reproduce this legend.

This approach is sufficient in most commercial contexts and should be sufficient in Government contracting. It puts a potential user on notice and provides him/her with the contractor's name and address so that he/she can inquire about the restrictions. Moreover, even within the proposed rules themselves, such inquiry notice is contemplated by special license rights legends.

- 3. As to identification and assertion of data rights in proposed rules 252.227-7013(e)(2) and 252.227-7017(c), it should be enough for the contractor to identify the technical data in which the data rights are asserted. The contractor should not also be required to identify the associated item, component or process. The contracting officer could ask for this information on specific technical data if desired, but in most cases this additional level of detail is unnecessary.
- 4. Proposed rules 252.227-7016(c) and (d) effectively give the Government, subsequent to contract award, unlimited rights in data contained in proposals, unless the offeror imposes restrictions. This is backwards. The general rule should be that the Government has no rights other than to evaluate the data unless otherwise provided in the contract, if awarded. This is the present rule and it ought not to change.

- 5. The proposed rules that prescribe the use of certain proposed contract clauses seem to contemplate that, in a given contract, there will be either (a) commercial technical data (or commercial software) or (b) non-commercial technical data (or non-commercial software). (See, e.g., 227.406(a) prescribing 252.227-7013, 227.503-6(a)(1) prescribing 252.227-7014, and 227.402-3 prescribing 252.227-7015.) This may not be the case. A single contract may cover both. Accordingly, insertions must be made in the prescribed contract clauses to make clear whether commercial or non-commercial data is concerned. For example, "pertaining to non-commercial items, components, or processes" should be inserted in the first sentence of 252.227-7013(a)(14) after the word "information" or at the end of the sentence; and "pertaining to commercial items, components, or processes" should be inserted in the first sentence of 252.227-7015(a)(5) after the word "information" or at the end of the sentence.
- 6. As to data in which the Government is initially granted government purpose rights, proposed rules 252.227-7013(b)(2) and 252.227-7014(b)(2) provide that the Government shall have unlimited rights after five years, unless otherwise agreed. The present rule does not specify a default period after which the rights become unlimited. The present approach should be retained or a much longer default period provided, e.g., fifteen (15) years, which approximates the 17-year period of patent protection. Many, if not most technologies have a life of significantly more than five years.
- 7. We recommend that following badly needed clarifying sentence be added to the "relation to patents" provisions (e.g., proposed rules 252.227-7013(b)(2) and 252.227-7014(b)(2)):

To the extent that any patent rights clause contained in this contract such as 52.227-11, 52-227-12, or 52-227-13 applies to any invention described or contained in any technical data or computer software or computer software documentation, the patent rights clause shall apply and this clause clause shall not apply.

We thank you for your consideration of these comments. If time permits, a specific response would be appreciated.

Sincerely,
Palul V. M. Babbers

Ralph V. G. Bakkensen

Assistant General Counsel &

Intellectual Property Coordinator

cc: Kermit Birchfield
Bob Fucile

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2367 Brittany Lane Amara, GA 30062-5783

August 15, 1994

Ms. Angelina Moy DUSD (A&T) / DDP 1211 South Fern St. Arlington, VA 22202-2808

Dear Ms. Moy,

This letter is to provide comments on DFARS case 92-D010. I am an independent consultant working with commercial firms to enable them to accept government business without segregation of activities. I am primarily involved with large commercial firms and specifically a group called IDCC (Integrated Dual-use Commercial Companies). The IDCC Chairman will separately submit comments regarding the 807 panel recommendations. The material that follows supports the fact that the proposed changes are needed if the government is to tap the vast technological resources that exist in commercial firms. This information was developed in doing research for an article that I am writing on commercial firms doing R&D with the government.

Considering the leaders in each of the 37 industry groups from the 1994 Business Week R&D Scoreboard, 95% of the firms that invest the greatest percentage of their sales in R&D do \$2 million or less in RDT&E with DOD. The two exceptions are 3M and Zenith.

68 % of the firms that invested the most dollars in R&D in each of the 37 industry groups had less than \$2 million in DOD RDT&E awards. These 37 firms invested more than \$30 Billion in R&D in 1993. After eliminating the firms that invested more than \$800 million (Boeing, GM, IBM, GE, 3M, Motorola, Xerox, Intel, and AT&T - all firms that can segregate government R&D) those avoiding DOD R&D contracts increases to 87 percent.

91% of the Fortune 500 Industrials had less than \$2 million in RDT&E DOD awards. Why?

One of the major reasons that commercial firms are reluctant to do R&D with the government is the fear of losing or tainting intellectual property that has been developed to provide the future of the firm.

The sources of the above information are the 1994 Business Week R&D Scoreboard, The 1994 Fortune 500 Industrials, and the BNA publication titled 500 Contractors Receiving the Largest Dollar Volume of Prime Contracts Awards For Research, Development, Test, and Evaluation, Fiscal 1992. I will be updating the above material and completing the article as soon as I receive the data for RDT&E for fiscal 1993.

Hopefully this information is helpful.

Robert C. Spreng



August 9, 1994

Department of Defense Deputy Director Major Policy Initiatives ATTN: Ms. Angelena Moy, OUSDA (A&T)/DDP 1211 Fern Street, Room C-109 Arlington, VA 22202-2808

Dear Ms. Moy:

Reference Federal Register 20 June, 1994 (59 FR 31584) which requested public comments on proposed changes to the Defense Federal Acquisition Regulations Supplement regarding Rights in Technical Data. Motorola appreciates the opportunity to provide the attached comments and recommendations for your consideration in developing a final rule.

Very truly yours,

James E. Muehleisen

Comments Regarding Proposed DFAR Rules on Intellectual Property Rights

The Intellectual Property Department of Motorola's Government Systems & Technology Group (GSTG) has reviewed the Department of Defense proposed rule regarding rights in technical data and computer software as published in the Federal Register, Vol. 59, No. 117, June 20, 1994. In response to the proposed rule changes Motorola GSTG has the following overall comments:

1. On April 6, 1994, the proposed regulations were forwarded to the Senate Armed Services Committee from Deputy Secretary of Defense John Deutch as a report containing the recommendations of the § 807 Government-Industry Technical Data Committee. In the forwarding letter, Mr. Deutch remarks that the recommendations satisfy an important goal in that they "do not affect the ability of any contractor, including spare parts replicators, to use data developed partially or totally with government funds to compete for U.S. Government contracts or subcontracts."

As a first comment, note that such a goal is achievable without granting unlimited rights to the U.S. Government.

The Government itself has no need for rights beyond GPLR, and GPLR treatment is consistent with the general royalty-free patent license for Government purposes which the Government receives in patentable intellectual property under FAR 52.227-12(JUN 1989).

Unlimited rights, which allow for non-Governmental uses, should be beyond the regulatory interest and scope of the proposed rule.

Even if unlimited rights are granted to ostensibly benefit the spare / repair parts contractors and subcontractors, the granting of unlimited rights to the Government has an extreme adverse effect on businesses that are data and software creators (including small businesses). The adverse effect can be so severe as to cause some businesses to refuse altogether to deal with the Government.

A significant substantive change to stimulate business and to improve the quality and innovativeness of the technology available to the Government would be to eliminate unlimited rights in computer software and technical data and to implement a rule providing only for limited or restricted rights and GPLR.

Motorola Intellectual Property Department, P.O. Box 10219, Scottsdale, AZ 85271-0219 Street Address: 8220 E. Roosevelt, Suite 3108, Scottsdale, AZ 85257 Mail Drop: CS44, CMS: APAT01 FAX: (602) 441-5544 2. The proposed regulations address previous omissions in the treatment of computer software (including the availability of GPLR, the opportunity to segregate restricted rights code from unlimited rights code, and the validation process regarding disputes in the marking of code) which is appropriate.

However, the proposed rule addresses those deficiencies by creating a completely <u>separate</u> set of provisions dealing specifically with the rights in computer software.

Because there is significant overlap between rights in technical data and rights in computer software, however, the creation of a completely new section unnecessarily complicates the regulation by making it excessively long and redundant.

The same objective of complete coverage of rights in computer software could have been accomplished more efficiently by making additions only to the extent rights in computer software differ or require additional definitions. By determining rights in computer software using the same definitions and rules as for technical data (to the maximum extent possible), and clearly pointing out where the treatment of computer software differs from the treatment of technical data, the user would have explicit clarification as to distinctions in treatment. As the draft rule is proposed, such distinctions are discernible only by detailed study and comparison of the technical data and computer software sections.

- 3. The following are viewed as potentially negative changes in the proposed rule:
- a. the proposed rule states that private expense includes costs not allocated to a Government contract; there would appear to be potential ambiguity in cost accounting which might cause a problem--also, this language may invite contractors to selectively charge important developments to other than Government contracts in a sub-optimum manner in order to protect key technology;
- b. the data developer is obliged to identify and list data at the outset of the contract on which it will place restrictions on use, release, or disclosure; the developer can enlarge the listing during performance of the contract only (i) based on new information, or (ii) to correct inadvertent omissions which would not materially affected the source selection decision.

These proposed changes are significantly more burdensome and onerous than the current rule which allows the contractor to protect items, components, processes, or code different from that proposed at contract award if the developer gives notice before committing to the use of such items, components, processes, or code.

Intellectual Property Department
Comments to Proposed Technical Data Rights Rulemaking
August 9, 1994
page 3

- 4. Notwithstanding the above, the following are viewed as positive changes. In comparison with the current rule, the proposed regulations provide:
- a. additional clarification that developments accomplished with costs charged to indirect cost pools will be treated as development at private expense:
- b. much greater clarity with respect to definitions related to computer software;
- c. for the availability of GPLR automatically for items, components, or processes developed with mixed funding (rather than the contractor asking for such rights, along with negotiation); moreover, the five year period of GPLR can be extended by negotiation;
- d. recognition of segregability or separability, under which the rights determination to modifications of particular items, components, or processes, or code are distinguished from the rights determination to the items, components, or processes; and
- e. for the elimination of acquisition by the Government of unlimited rights if the development of items, components, or processes was "required for the performance of a government contract or subcontract".

Ms. Angelena Moy
OUSD (A&T)/DDP
Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808

Dear Ms. Moy:

The undersigned industry associations appreciate the opportunity to comment on the proposed rule on Rights in Technical Data which was published in the Federal Register on June 20, 1994. We commend the efforts and results of the "807 Committee". In our judgment, the proposed rule developed by the Committee reflects a considered treatment of the issues and the interests of both Government and private industry. It reflects reasonable compromises and practical solutions to many of the issues and problems inherent in the current interim regulation.

The 807 Committee product is the culmination of a ten-year effort to implement statuory provisions enacted in 1984 and codified at 10 U.S.C. 2320 and 2321. These provisions were enacted in part as a result of diverse regulations promulgated by the Military Services in the early 1980s, and were intended to achieve uniform regulations which balanced the interests and rights of the government and the creators of technical data. Several attempts to develop such regulations eventually resulted in the current (1988) interim regulation. However, this regulation did not achieve a fair allocation of rights, and industry was unsuccessful in its efforts to effect modifications.

Congress intervened to resolve this stalemate by including in the FY1992 DoD Authorization Act a provision directing the formation of a Federal Advisory Committee, which came to be known as the 807 Committee. The Committee provided a public forum in which representatives of all groups interested in technical data rights could meet and negotiate as equals. The Committee charter and format allowed the parties to fully discuss, debate, negotiate, and otherwise explore the needs, limits and views of each of the participants.

The final Committee work product, achieved only through extensive negotiations and compromise, does not and could not fully satisfy every individual or group. It is, however, the well-reasoned effort of dedicated representatives of every group and constituency impacted by the regulation, and represents a major advance in fairness of treatment of the creators' rights in technical data. We strongly believe the proposed regulation is a significant improvement over the current interim regulation, and should be the baseline for any future improvements.

We therefore recommend that the proposed regulation be adopted without substantive changes at this time. It is a significant improvement in the decade-long attempt to balance the interests and needs of the creators of technical data (many of whom are represented by the undersigned associations), the users of technical data, and the Government, and reflects the extensive debate and compromise among the 807 Committee members. Any substantive modifications made at this stage of the process, especially changes to accommodate the narrow interests of any particular group, will destroy the hard-won consensus of the Committee and the improved regulation it has produced. We would strongly oppose any final rule that undid the 807 Committee's work. If any substantive changes are considered, we urge that the 807 Committee be reconvened to discuss and resolve such changes at a public hearing.

Some of the more significant compromises and concessions made by the creators of technical data in developing the proposed regulation are listed and briefly discussed in Attachment A.

These clearly illustrate the commitment of the 807 Committee to correct some of the inequities in the 1988 interim regulation and to develop a more balanced treatment of data rights as directed by Congress in 1984.

Finally, while we urge adoption and promulgation of the 807 Committee product to replace the current interim regulation, we also believe that there are a number of issues -some treated by the proposed regulation, and some not -- for which the final words have not yet been written. Some of these issues are noted in Attachment A, and these and others will become apparent as technology, statutes, business practices, and procurement policies evolve. Some were beyond the scope of the Committee's efforts, and some may be created by the new regulation itself. We have attempted to outline these future concerns in Attachment B, and pledge our respective organizations to continue the cooperative Government/industry effort to build on the work of the 807 Committee and ensure that the regulations continue to reflect a balanced allocation of rights in technical data.

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Aerospace Industries Association

Dan C. Heinemeier

Electronic Industries Association

hes R. Hogg

National Security Industrial Association

S.O. Nunn

Shipbuilders Council of America

J. Richard Iverson

American Electronics Association

Lawrence F. Skibbie

American Defense Preparedness Association

Bettie S. McCarthy

Proprietary Industries Association

Matthew/Coffey

National Tooling & Machining Association

ack Janetatos

Marine Mackinery Association

Kenneth McLennan

Manufacturers Alliance for Productivity

and Innovation

ATTACHMENT "A"

AREAS OF COMPROMISE

¥ EXPIRATION OF "GOVERNMENT PURPOSE RIGHTS" LICENSE

The proposals require that the Government be granted this license automatically whenever an item, component, or process (ICP) is developed with "mixed" funding. During a five (5) year period, starting with contract/subcontract award or modification, the creator of the related technical data has the exclusive right to commercialize the ICP. After that period expires, the Government is entitled to an unlimited rights license in the ICP, without regard to the contribution or interests of the developer.

In most cases, the period of exclusivity will be too short, making it unlikely that a contractor/subcontractor will be able to capitalize satisfactorily on its private investment. Further, upon expiration of the five (5) year period, the technical data is available on an unrestricted world-wide basis. As a consequence, the domestic industrial base could lose a competitive advantage to subsidized foreign competition.

While the time period appears to be negotiable, there is no incentive for the Contracting Officer to negotiate and many barriers exist which the Contracting Officer could use as excuses to avoid negotiation. Further, the Contracting Officer is not encouraged by any policy guidance in the regulatory text to extend the period in order to encourage commercialization of the technology or to reflect the private investment of the contractor/subcontractor. As a consequence, not only will private investment be discouraged, but the best private developments of Industry may not be made available to the Government.

¥ DEFINITION OF "DEVELOPED"

The definition, as it applies to items, components, and processes (ICP), ignores the reality of commercial computer aided design, manufacture and simulation practices. The definition is unreasonable since it requires the existence of a prototype before the ICP can be deemed to be "developed" and before the technical data depicting the ICP is protectable as "limited rights" technical data.

Contractors and subcontractors are reluctant to spend private funds on any development where the cost of prototyping is prohibitive. Additionally, modern manufacturing techniques often make "traditional" prototyping superfluous. For example, the Boeing 777 was designed using new computer aided processes which minimized prototyping. Thus, some of the most innovative concepts regarding new ICPs may not be disclosed to the Government because of the uncertainty of the scope of protection of the related proprietary technical data.

The definition, as it applies to "computer programs", also fails to recognize the value of computer software before executable code is tested on a computer. With current software development techniques, coding has become more mechanical. At times software creates other software, once the logic requirements of the software have been determined. The value of software is maximized -- not when it has run on a computer -- but when the logic requirements have been ascertained and "reasonable persons skilled in the software "art" believe that the software will work as intended."

For those reasons, Industry representatives on the Section 807 Committee recommended that the definition of "developed" require that the ICP "exist and/or be workable" not "exist and workable".

The definition problem as it relates to ICP is equally applicable to software. Hence, the definition of software must ultimately be revisited as well.

¥ LACK OF EFFECTIVE IMPLEMENTATION OF DATA REPOSITORIES

The proposal includes a new policy recognizing the need for a system wherein prime contractors make procurement data available to prospective offerors and contractors. However, the policy statements are equivocal and do not establish any implementing mechanism to achieve the policy requirements.

¥ EXPANDED "RESTRICTED RIGHTS" LICENSE IN NON-COMMERCIAL COMPUTER SOFTWARE

The proposal now permits third parties (who may be competitors of the original contractor or subcontractor) to have access to and the right to modify non-commercial computer software. Most developers firmly believe that the expansion of this license (the minimum license that may be granted in privately developed software) is a strong disincentive to the private development of new and improved software only for the Government. While it is not improper for the Government to demand an expanded restricted rights license in non-commercial computer software, we view it as bad policy.

¥ PAPERWORK BURDENS AND COMPLEXITY

The proposed clause at 252.227-7014, coupled with the proposed clause at 252.227-7019, requires, for the first time, the creation and maintenance of records and a system for proving the exclusive private development of computer software. In the past, the parties could simply agree that the Government would be granted a restricted rights license in non-commercial computer software (see the 1988 interim rule at 252.227-7013 (c)(1)(i)). Under the current interim rule, the only record that the contractor/subcontractor has to maintain is a copy of the license agreement that was made part of the prime contract.

The proposed clause at 252.227-7028 requires the tracking of individual items of technical data and computer software previously delivered, or to be delivered, to the Government. This new requirement will necessitate the creation and maintenance of new records and expensive systems. In contrast, under the 1988 interim rule at 252.227-7028, contractors and subcontractors only have to identify compilations of technical data previously delivered to the Government, not individual items of technical data.

If these paperwork burdens are maintained in the final rule, the requirements should be prospective only. Records cannot be maintained if they were not created in the first instance. Neither the contractor/subcontractor nor the Government can afford to research retroactively and create the records which will be required by the proposed regulations.

Finally, there are complex marking requirements for both technical data and computer software. In the case of technical data, the restrictive legends must be placed on every page containing technical data deliverable to the Government with less than an unlimited rights license. That requirement will minimize the quantum of useful information that may be disclosed on a document page or on a drawing. In the case of non-commercial computer software, restrictive notices that "interfere with or delay the operation of computer software" are prohibited (see proposed regulation at 252.227-7014 (f)(1)). This last requirement places the contractor or subcontractor in an unreasonable position. Marking is required in order to protect the software, but under certain circumstances, marking is prohibited. More flexible marking requirements are needed.

ATTACHMENT "B"

FUTURE CONCERNS

¥ TREATMENT OF "COMMERCIAL ITEMS"

Current DoD policy encourages the acquisition of commercial items and their derivatives whenever those items satisfy or can be made to satisfy the needs of the Government. (See, for example, the Memorandum of SECDEF William J. Perry, "Specifications & Standards - A New Way of Doing Business", June 29, 1994.) Many of these acquisitions will not be possible unless made on a commercial basis. The proposed clause at 252.227-7015 ("7015 clause") does not comport with DoD's own present policy and direction.

For example, under the proposed rule, flowdown of the "7015" clause to preexisting suppliers and subcontractors is mandatory. The "7015" clause is not negotiable as are <u>all</u> other proposed clauses. Further, the license rights granted the Government in the "7015" clause are inconsistent with those granted to commercial customers. Finally, if commercial items are not exempt from 10 U.S.C. 2320 or 10 U.S.C. 2321, a commercial vendor will be obligated to prove that its proprietary technical data pertains to a (commercial) item that was developed exclusively at private expense.

The right of the Government to require a contractor or a subcontractor to prove exclusive private development of a commercial item is based upon statute and is one of the greatest impediments to the acquisition of commercial items by the Government. The Section 807 Committee elected not to recommend statutory changes to 10 U.S.C.2320 or 10 U.S.C.2321. However, acquisition reform bills currently pending in Congress may have a direct impact on the current proposals, especially in the area of commercial items. Any statutory reforms promulgated by Congress and the Clinton Administration should be incorporated in the proposed rule before it is made final.

¥ COMMERCIALIZATION OF TECHNOLOGY

The current proposal provides insufficient encouragement to commercialize federally funded technology. The Reagan Administration's Executive Order 12591 and the Clinton Administration's polices, announced during the late stages of the deliberations of the Section 807 Committee, state that consideration should be given to limiting the Government's use of technical data and computer software to "government purposes" only. The "developer" of the data and software should be encouraged to commercialize the technology it develops with federal funds. While the current proposal provides equivocal support to the commercialization of mixed funded developments, there is no affirmative policy guidance in the proposed regulatory text regarding the commercialization of federally funded developments.

The current proposals grant the Government an unlimited rights license in data pertaining to items, components, and processes and computer software developed exclusively with government funds. That places that data and software at risk of loss to foreign competition and does not provide the original contractor or subcontractor with sufficient incentives to commercialize the technology.

¥ NEW DIGITAL DATA ENVIRONMENTS

The proposed marking requirements fail to take into consideration the creation of electronic data bases (i.e., CALS Implementation Guide). Also, the subsequent use, storage, and delivery of individual data elements from such a data base (i.e., Contractor Integrated Technical Information Service (CITIS)) needs to be examined more closely. For example, the proposed marking requirements contemplate the use of a paper or microfilm media (hard copy). In a digital environment (diskettes, computer tapes, optical disks, computer memory), these requirements will be unworkable and unwieldy.

In another scenario, a digital drawing may be viewed on the screen of a computer workstation in such a manner that any restrictive legend may be avoided and not seen by the user. When downloading the drawing to a printer, the legend may not be printed. When extracting salient information from a digital drawing, the restrictive legend might not be extracted. Thus, technical data that may have initially been properly marked may not be effectively marked when a user accesses the data or uses it as intended in a digital environment.

The proposed regulations do not appear to have carefully considered the problems that will be experienced in the new digital environments. These issues will have to be confronted as CALS and CITIS requirements are implemented within the defense contractor community. Failure to do so will result in inequitable and inappropriate use, and unwarranted disclosure of contractor and subcontractor proprietary technical data and computer software.

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RICHARD W. OJA

Consultant
Aerospace Prime & Subcontracts

August 8, 1994

Deputy Director Major Policy Initiatives 1200 S. Fern Street Arlington, VA 22202-2808

ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: Data Rights/DAR Case 91-312

Please consider the following comments to the DFARS proposal, 59 FR 31584, June 20, 1994 as included in the CCH Government Contracts Service revision Number 1245 dated July 27, 1994. These include typo's as well as a few substantive comments.

- 1. 227.403-3 (c) In first line, correct the 2nd "to" to read "the".
- 2. 227.403-5 (b) (ii) The "(ii)" needs to be moved to the left 2 spaces.
- 3. 227.403-5 (b) The word/term "research contract" is not defined elsewhere. Is research intended to be limited to mean "research" as included in the term "experimental, developmental or research work"?
- 4. 227.403-6 (d) The word "contractors" should read "contractor". Alternatively the phrase "of its contract" could be revised to read "of the contract".
- 5. 227.403-7 (b) The phrase "Government contractors which require" should read "Government contractors who require".
- 6. 227.403-8 (b) In the 1st sentence, 4th line. revise the phrase "firm requirement technical data" to read "firm requirement for the technical data".
- 7. 227.403-8 (b) In the 1st sentence, 5th line, insert a comma "," before the word "but".
- 7. 227.403-9 (a) In the 1st sentence 4th line, move the commas to read "to grant or obtain for the government, license rights".
- 8. 227.403-9 (a) In the 4th, 5th and 10th lines the word "government" should be capitalized to read "Government". This should be consistently use where it is applicable.

- 9. 227.403-10 (a) (3) In the 1st sentence, the phrase "attached to its contract should read "attached to the contract".
- 10. 227.403-10 (b) Capitalize the word "The" at the beginning of the sentence.
- 11. 227.403-10 (b) (i) The wording after the 1st phrase is awkward and could be revised to read "A contractor who desires to restrict the Government's rights in technical data to place restrictive markings on the data. It also provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings. The word "certain" could be changed to read "specific".
- 12. 227.403-10 (b) (2) In the 1st sentence, line 4 and 5, there seems to be a wording problem in the phrase " in which the Government has previously obtained rights with the Government's pre-existing rights in that data". Is a word missing between "obtained" and "rights"? I believe this is intended to reflect the requirement in 252.227-7013 (f) (5), but there is something wrong.
- 13. 227.403-10 (c) (1) In the 2nd sentence, change the period "." to a comma "," after the 1st phrase.
- 14. 227.403-12 (a) (1) Reverse the order of sentences 2 and 3 and then delete the word "also" in the phrase "is also a nonconforming marking."
- 15. 227.403-12 (a) (2) In the next-to-last sentence, revise the phrase "correct any nonconforming markings" to read "correct or strike any nonconforming markings." Also revise 252.227-7013 (h) (1) to be consistent. It is both cost effective and expedient to permit the Government to "correct or strike" an improper restrictive marking.
- 16. 227.403-12 (b) (2) (i) Reverse the order of the 1st phrase in the sentence to read "Correct or strike". This makes it consistent with the order used elsewhere.
- 17. 227.403-12 (b) (2) (ii) In line 2, insert the words "or striking" after the word "correction"
- 18. 227.403-13 (c) (1) (iii) In the 5th line, the phrase "in the software" seems to be incorrect. It should be revised to read "in the technical data".

However, since 227.503-13 (d) (2) incorporates "the guidance at 227.403-13" the phrase could be revised to read "in the technical data or software." NOTE: This is the type of problem which was intended to be eliminated by having separate treatment for computer software. I have not specifically reviewed the computer software regulations for any other incorporation by reference areas.

19. 227.403-14 (a) (1) - In the last line correct the spelling of the word "contract".

- 20. 227.403-15 (b) The "(b)" is missing and should be inserted prior to the beginning of the sentence "10 U.S.C. 2321 permits...."
- 21. 227.503-10 (b) (1) and (2) The same issues noted in Items 11 and 12 above apply here.
- 22. 227.503-12 The same issues noted in Items 15, 16 and 17 above apply here.
- 23. 252.211-7012 (b) (3) Paragraph "(3)" is duplicated in its entirety and should be deleted.
- 24. 252.227-7013 (b) (6) The release from liability provision is the MAJOR PROBLEM with the proposed data rights provisions. I have been following the new data rights regulations as they have evolved over the past few years and this is the first time that I've noticed a release provision like this. I would like to know more about this particular item and would appreciate hearing from someone who has some current insight. I would appreciate having someone call me at (714) 733-9104. My FAX uses the same number.

This release provision should not be accepted by an innovative contractor or subcontractor who agrees to deliver technical data with restrictions. As I see it, this is the only unacceptable provision in the entire proposed data rights regulations. The 252.227-7013 clause is the basic data rights clause and it is a mandatory clause in all solicitations and contracts for noncommercial items when the successful offeror/s/ will be required to deliver technical data. The problem occurs only when the technical data will be delivered with restrictions.

The problem is that the proposed release expressly absolves the Government (and also the higher tier contractors in Subcontract situations) of liability for any wrongful use by other parties of data which was delivered with restrictions (i.e. Government Purpose Rights or Limited Rights data). This is because: 1) the contractor expressly agrees to release the Government from liability for any third party (or fourth party or more) violations, and 2) the contractor expressly agrees to look solely to the party who has violated the rights of the contractor. Both the Government and the higher tier contractors (i.e. the Prime contractors) are ostensibly off the hook and the small innovative subcontractor, who is in the least favorable position to seek legal relief, is on the hook. I prefer to leave the situation as it currently is and leave the owner of the data with all of the currently available contract and legal remedies. The small innovative subcontractor will be reluctant to deliver limited rights data unless the release provision is either deleted or modified.

NOTE: This same issue also applies to 252.227-7014 (b) (6) and 252.227-7018 (b) (7).

25. 252.227-7013 (b) (6) - In the second line, capitalize the word "Government".

26. 252.227-7013 (e) (3) - The Identification and Identification Attachment is poorly placed on the page which makes it difficult to understand. There is no reason to present the Attachment in 4 columns. Column 1 would generally require a listing of the data. However, columns 2 to 4 would generally require only one entry (assuming the same information would apply to all of the listed items in column 1). It would be easier to understand if the Attachment is presented in one column in the regulations.

It might also help to separate the 1st sentence of the narrative from the title (Make the title all caps) to make it clear that "IDENTIFICATION AND ASSERTION OF RESTRICTIONS ON THE GOVERNMENTS USE, RELEASE OR DISCLOSURE OF TECHNICAL DATA" is the title for the Attachment.

I also recommend shortening the title to "IDENTIFICATION OF RESTRICTED USE DATA" to also save a great deal of space whenever the Attachment is described in contract documents.

I understand the proscribed wording for the Attachment is intended to be mandatory. However the 4 explanatory notes are not necessary. It would help prevent future misunderstandings if there is a note which states "The 3 explanatory notes (*, **, ***, and ***) are not required to be included as part of the Attachment." This would leave it open as an alternative when a Prime Contractor prepares the Attachment as a form to be filled in by a lower tier Subcontractor.

- 27. 252.227-7013 (h) (1) In line 8, add a period at the end of the 1st sentence (i.e. after the phrase "on Technical Data".).
- 28. 252.227-7013 (h) (1) In line 11, change "correction or cancel" to read "correct or strike". Use of the word "strike" is preferred to using "cancel" and is consistent with the use of the word "strike" in 227.403-12 (a) (2). Also add the wording from 227.403-12 (a) (2), "When it is impractical to return technical data for correction, contracting officers may unilaterally correct or strike any nonconforming markings." (also see Item 15 above). In many cases it is more cost effective for the contractor to send a FAX authorizing the Government (or higher tier contractor) to correct or strike nonconforming or unjustified restrictive markings.
- 29. 252.227-7013, ALTERNATE I Add an introductory statement, "As prescribed in 227.403-6 (b), add the following paragraph to the basic clause:".
- 30. 252.227-7014 (b) (6) The comments in Items 24 and 25 above also apply.
- 31. 252.227-7014 (e) The comments in Item 26 above also apply.

- 32. 252.227-7014 (f) (1) In the 2nd sentence, insert "transmittal document or" before the word "storage container. This makes it consistent with 252.227-7013 (f) (1).
- 33. 252.227-7015 The title to both this paragraph and the clause should be revised to read, "Rights in Technical Data-Commercial Items" and "RIGHTS IN TECHNICAL DATA-COMMERCIAL ITEMS" respectively. This gives commercial items the same stature and makes it consistent with 252.227-7013, 252.227-7014 and 252.227-7018.

NOTE: I prefer to relocate all of the Rights in Technical Data-Commercial provisions immediately after the Rights in Technical Data-Noncommercial Items. This would give Commercial Items a more equal status with Noncommercial Items.

- 34. 252.227-7016 (c) (2) Insert ,"Rights in Technical Data-Commercial Items" after "Computer Software Documentation,". The Commercial Items should also be included in this paragraph.
- 35. 252.227-7017 (a) In line 2, insert "the" prior to the word "following'.
- 36. 252.227-7017 (d) The comments in Item 26 also apply.
- 37. 252.227-7017 (d) The comments in Item 26 also apply.
- 38. 252.227-7017 (d) The Attachment includes a 5th explanatory note (i.e. "***** Enter "none" when all data or software will be submitted without restrictions.") which should be deleted to make it consistent with 252.227-7013 and 252.227-7014. It is much more efficient to require the Attachment only when an offeror intends to include a restrictive marking on any data to be delivered under a proposed contract. In the vast majority of solicitations there will not be a requirement to submit an "Attachment". Applying this logic further, there is no reason to require an "Attachment" in a contract which would state "none".
- 39. 252.227-7018 (b) (7) The comments in Item 24 also apply.
- 40. 252.227-7018 (e) (3) The comments in Item 26 also apply.
- 41. 252.227-7018 (k) (4) ALTERNATE Add a "I" after the word "ALTERNATE" in the title.

This concludes my comments. When I first decided to respond I did not envision all of this detail. I'm sure many of the items have been brought up by others.

Most of my contract clients are small innovative subcontractors and data rights is an important part of my consulting business. It was also important for over 25 years when I previously served as Director of Contracts for the Aerospace Group of Parker Hannifin Corporation.

I am available if there are any questions regarding the items which I commented upon.

Sincerely,

Richard W. Oja, CPCM

BIOGRAPHICAL SKETCH: RICHARD W. OJA

- * B.A. (Business) from Michigan State University (1959)
- * National Contract Management Association (NCMA) member since 1967 (currently Orange County Chapter)
- * Professional Designation in Government Contracts, UCLA Extension (1969)
- * J.D. (Law), Western States University College of Law (1975)
- * Member, California Bar since 1976
- * Certified Professional Contract Manager (CPCM), NCMA since 1976
- * Pony Express Award, NCMA Southwestern Region (1980)
- * Member, Machinery and Allied Products Institute (MAPI) Government Contracts Council (1981-1986)
- * University of California Irvine Extension Member Advisory Council for Contract Management Program since 1983
- * American Bar Association (ABA) Public Law Section (1984 1994)
- * Fellow Award, NCMA (1987)

Mr. Oja has been actively working in Aerospace Contracts since July 1959 when he began his Contracts career at North American Aviation, Los Angeles Division as a Senior Statistician analyzing Subcontractor Proposals on the B-70 Program. Since then he was at Parker Hannifin Corporation for 27 years, serving in various production control/contracts/program management positions, most recently serving as Director of Contracts for the Aerospace Group coordinating all aspects of contracts in this multidivision operation. He performed a key role in the formulation of contract policies and implementation, as well as understanding and interpreting Government regulations, specifications and procedures as they apply to both fixed and cost reimbursement contracts in the contract, finance, quality and technical areas. He also conducted training for Parker's contracts and procurement personnel for many years. He directed Parker's first successful Contractor Procurement System Review (CPSR), coordinated Offset Programs, Export Licensing and served as the Small and Disadvantaged Business Liaison Officer. Since leaving Parker in 1986, Dick is self employed as an Aerospace Contracts Consultant specializing in Proposals, Pricing, Problem Evaluation, Data Rights, T&Cs, Changes, Terminations and Training.



Gear and Tool Corporation

530 WESTGATE DRIVE . ADDISON, ILLINOIS 60101-4584

Area Code 708-543-9570

July 19, 1994

Mr. Robert Donatuti Deputy Director for Major Policy Initiatives 1200 S. Fern Street Arlington, Va. 22202-2808

Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR CASE 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. We have been making parts for programs such as the M60 tank engine, final drives for the M113, M1, M2, landing struts for the C5A, antenna raising gearboxes for the Navy since 1968.

We at Overton Gear & Tool Corporation are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

- * Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.
- Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that

THE OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed--according to any formula--with any of our tax dollars. In a given year, we rely on technical data access for five to ten percent of our business.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands parts at a cost savings to the taxpayer, it will further of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the \$500 toilet seat Secretary Perry is hoping to avoid.

Yours very truly,
OVERTON GEAR AND TOOL CORP.

The second secon

Charles A. Brannen

CAB:mt



PACIFIC SKY SUPPLY INCORPORATED



8230 San Fernando Road, Sun Valley, California 91352 (818) 768-3700 FAX (818) 767-6278 F.A.A. Repair Station QQPR566K

August 19, 1994

Deputy Director Major Policy Initiatives 1200 S Fern Street Arlington, VA 22202-2808

ATTN: Ms. Angelena Moy

OUSD (A&T)/DDP

RE: DAR Case 91-312

Dear Ms. Moy:

As a small business manufacturer, and contractor to the DOD, Pacific Sky Supply, Inc. is opposed to any additional restrictions proposed by the S 807 Technical Data Committee limiting the availability of technical data to U S manufacturers for the reasons below:

Loss of U S Jobs & Manufacturing Capability: The practical effect of limiting data is limiting competition and maintaining artificially high prices. This makes US manufactured goods less competitive in the international market, and would result in loss of business and jobs to foreign competition. The OEMs are incorrect if they think that customers will be forced to buy from them if they are the only source. The real world is more realistic than that, and customers will either choose another product or find a way to buy it cheaper outside the US.

Inflate Costs to US Taxpayer: We are aware of an item that an OEM purchases from a vender for approx \$200.00; marks up 500% commercially, and 380% to the DOD. There are current buys totalling over 2,400 units outstanding for this item¹, and the OEM will not permit the actual manufacturer to sell directly to the government. Before a minor specification change, the part was produced competitively for approx \$32². With the minor

¹San Antonio ALC solicitations: F41608-94-R-49517 648 ea 6891570 Kit, F41608-94-R-49072 1,458 ea 23039657 Facing. Defense Industrial Supply Center contract #S00500-94-C-0810 300 ea 6829451 Outer Member.

² See attached procurement history for 6789589/23039657 Facing.

(proprietary) change, the effect of which limits the contract to the OEM, the taxpayer will pay over ten times what it should.

After years of benefitting from substantial cost savings through competitive procurements that are only possible if data is freely available, why is S 807 Committee now recommending changes. The reason is obvious: A self serving committee made up primarily of OEMs is attempting to increase profits with artificial rule changes.

I urge you to consider the source of this recommendation and act in the best interest of American taxpayers and small business manufacturers.

Sincerely,

Thomas E. Smith

President

Version 8.31

CD-FICHE (R)

8-18-1994

INC:77777 HM:N FIIG:A23900 DA: :2840-00-714-5787 AIN:FACING, PROPELLER BR ISC:2 DML:J

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6789589	5	2		5	63005	GENERAL	MOTO	
6789589	5	9	3	4	73342	GENERAL	MOTO	

Date Contract No.	History Data: SOS Quantity		G,PROPELLER BR CAGEC Vendor
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brorease en price ofter "proprietary" change: from \$31.90 to \$350.00 for essentially the same part.

#36

PRECISION GEAR INCORPORATED

· 48-09 108th Street · Corona, New York 11365 · 718-592-7100

PAX: 7:8-592-2525

July 20, 1994

Mr. Robert Donatuti
Deputy Director For Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATT: Ms. Angelena Moy, OUSD (A&T)/DDP

SUBJ: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality flight safety critical (life support) spare parts to the government at competitive prices far below typical OFM pricing. We have been performing this service for over 20 years saving DOD millions of dollars.

We at Precision Gear Incorporated are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

- changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM. The data belongs to you & I, the taxpayer.
- e Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)



\$5.000

Mr. Robert Donatuti Page 2 July 20, 1994

e We are aware of contentions that these changes will only affect future development. We know, however, that these changes may be applied to system upgrades, contract enhancements, atc., and seriously affect the spare parts market.

It seems: "Less data means less competition" E. Spector 1993. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed—according to any formula—with any of our tax dollars. The breakout program has saved the taxpayer \$20 billion annually since its enactment in 1984.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the \$500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

Matthew S. Forelli

President

& The Employees of Precison Gear Incorporated

(312) 583-1616 100-398-9980

3313 West Newport Avenue ago, Minois 60618-6596

July 20, 1994

The Honorable Paul Simon United States Senate Washington, DC 20510

I am writing to make you aware of the concerns of our company regarding Dear Senator Simon: a proposed rule change in the Defense Federal Acquisition Regulations (DPARS). A DOD committee has proposed a rule change which will sign nificantly affect our ability to do business and will result in in-

We are a small business that manufactures gears for industrial applicreased costs to the tampayer. cations which includes the Government.

I have enclosed a copy of our comments to DoD. Briefly, the rule change will result in significantly less data for competitive purchange will result in significantly toos union to temperature per great poses in DoD procurement - i.e., the prime contractors will have great leavely to insist the Government purchase components from them or to offshore source the components to foreign compenies to meet offset credits or further foreign marketing arrangements. At DoD Director of Procurement, Eleanor Spector has repeatedly stated, "less data means less competition." The results, simply stated, will be the export of American dobs, decimation of a crucial element of the defense industrial base. jobs, decimation of a crucial element of the defense industrial base and increased costs to the taxpayer.

Employees of our company in Illinois need for you to urge Congressional leaders to hold hearings on this issue before the final rule takes effect. Please contact Sen. Dale Ampers, Chairman of the Small Business Company and sale them. mittee and ask them to hold hearings and request delay of implementation until Congress has had the apportunity to review the issue. DoD's own until Longress has hed the proposed rule may have a significant sconomic analysis somits: "This proposed rule may have a significant sconomic impact on a substantial number of small entities.

Thank you in advance for your leadership on this issue. It is of great importance to the many skilled workers in Illinois.

Sincerely.

Process Gear Company, Inc.

President

COPY

July 20, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 South Fern Street
Arlington, VA 22202-2808
Attn: Ms. Angelena Moy, CUSD (A&T)/DDP

Subject: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to respond to your request for comments on the proposed changes in regulations governing rights to technical data. We do not develop data but do utilize technical data provided by the government to produce quality spare parts for the government at competitive prices and have done so for many years.

We are legitimately concerned that these changes will negatively affect our business apportunities. As a small business we are slee concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business in the aftermarket. We are also bringing this matter to the attention of our elected representatives in the hope that Congress will fully review the negative impact of this change on competition and on our tax dollars.

We are concerned about the following:

- That changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should become the property of an UFF.
- 2. That data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility but still beleieve that the OEMs will find this a loophole through which to crawl. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)
- 3. We are aware of contentions that these changes will only affect future development. We are fearful however, that these changes may be applied to system upgrades, contract cohancements, etc. and seriously affect the spare parts market.

The more data available, the more competition. The more competition, the greater the savings to the taxpayer. We as taxpayers have a right to the savings produced through the competition as well as a right to the data developed, according to any formula, with any of our tax dollars.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country it will further erode the second tier suppliers which form an essential segment of our defense industrial base. Finally, it will result in American jobs sent offshore and a return to the \$500 toilet seat that Secretary Perry is hoping to avoid.

Sincerely,

Innovation at Private Expense

220 North Glendale Ave., Suite 42-43, Glendale, CA 91206 (818) 502-1031 FAX (818) 502-9078 733 15th St. NW, 7th Floor, Washington D.C. 20005 (202) 393-0020 FAX (703) 241-1035

August 16, 1994

Ms. Angelena Moy
OUSD (A&T)/DDP
Deputy Director Major Policy Initiatives
1200 S. Ferm Street
Arlington, VA 22202-2808

Re: Comments on Proposed Rule DAR Case 91-312

Dear Ms. Moy:

The Proprietary Industries Association (PIA) commends the Government for proposing improved regulations which, for the most part, are workable for contractors and the Government. Nevertheless, changes are needed before the regulations are in final form in order to meet the letter and intent of statutes and to conform to agreements made between Government and Contractor groups in the last several years. Most of these changes are minor but important.

Larger, longer-term changes are needed because world events and technology have overtaken the slow regulation drafting process. These changes address at least four issues:

1) protection of data rights when the data is created or stored in an electronic medium; 2) adapting the regulations to commercial products and contractors; 3) computer software; and 4) reducing the cost of administrating the regulations. Addressing these areas could require substantial changes to the regulations but should be done.

PIA is a national organization of DoD subcontractors which develop innovative products at private expense and represents an important segment of the aerospace industry that is primarily small business. PIA was founded in 1985 and has concentrated nearly all its effort on the formulation and administration of data rights regulations that are fair and encourage innovation at private expense. We are a member of the Government Industry Technical Data Advisory Committee and we support in general the product of that committee.

The small but important changes needed in the proposed rule, before it is issued in final form, are contained in the attached Appendix A, along with brief reasons why. Some of the issues associated with the longer-term changes are spelled out in Appendix B. For these issues, we do not have quick, easy solutions but recommend that a suitable ad hoc group be put

Innovation at Private Expense

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together to develop the solutions. This is necessary to avoid immediate criticism of the regulations for being out of step with Administration policy and current technology.

PIA thanks the Department of Defense for the opportunity to participate in the Government-Industry Technical Data Advisory Committee. Our decision to join in the supplementary comments and our additional comments herein do not diminish our admiration for the accomplishments of the Committee and the personal contributions of the members. We are especially appreciative for the firm leadership of Ms. Eleanor Spector, which was a key factor in bringing the diverse membership to a near-unanimous recommendation.

Very truly yours,

P.L. Kearney

Director

PLK/b

cc: E. Spector

Innovation at Private Expense

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Appendix A (Specific Comments)

SUBPART 227.400

227,400(a) Scope of Subpart -

Under this clause there is a general comment associated with the Government's ability to MODIFY technical data. This should be limited such that it is not in derogation of the design agent's authority. This is a matter of operational integrity and safety. Delete all references to "MODIFY" in the following places:

400(a), line 2	403-7(a)(2), line 6
402-1(b)(2), line 2	403-7(c)(1)(a), line 1
402-2(a), line 4	403-7(c)(1)(b), line 1
403-7(a), line 3	403-13(a), line 2
403-7(a)(1), line 2	403-17(a), line 7

Reason

Public Law 98-525 §1216, 10 U.S.C. §2320 (a)(2)(A) does not require this degree of usage. It only lists use, release or disclosure of technical data. There is no mention of, or provision for modification.

227.402-2(a) Rights in Technical Data

Substitute "written" for "express" at last line.

Reason

Clarification and to provide a substantive record of permission.

227.402-2(b) Rights in Technical Data

Line 5, change "the.. agreement" to "a special license agreement made a part of."

Line 6, substitute "to the contract" for "thereto."

227.402-2(c) -

Add this new subparagraph: "A Contractor, at any tier, having the clause at DFAR 252.227-7013, Rights in Technical Data - Non-Commercial items, in its contract, shall use the clause at 252.227-7015, Rights in Technical Data — Commercial Items, in solicitations and contracts

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when the lower-tier contractor will be required to deliver technical data pertaining to commercial items or processes.

Reason

For consistent application of the policies established regarding commercial items or processes, contractors must have the ability to use the -7015 clause at lower tiers of contracting.

227.402-3 Contract Clause

Add "components" in last line between "commercial items" and "or processes."

Reason

Consistent with scope of regulations.

227.403-4(a)(1) Technical Data Pertaining to Items, Components, or Processes

At line 10, after "funding" add "and the government has obtained government purpose rights."

Reason

Clarification.

227.403-4(b) Source of Funds Determination

At line 5 and line 7, after "limited rights" add "or Government purpose rights."

Reason

Clarification and inclusion of Government Purpose Rights (GPR).

227.403-5 Government Rights

(a)(1) and (a)(2) - There is little conceptual difference between these two categories and, as such, both should include the phrase "developed exclusively with Government funds." Therefore, with regards to rights allocation:

(a)(2) line 3, delete the words after "was" and add "and will be developed exclusively with Government funds."

Innovation at Private Expense

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(a)(3) - Construction is unclear; refers to type of contract while all of other categories specifically focus on type of determination.

(a)(9) - Delete

Reason

DFARS 227.403-5, Government Purpose Rights - There is no conceptual reason why, at the expiration of the GPR period, the government should obtain unlimited rights. (See 10 U.S.C. 2320 (c)(1), which discusses only the need "to use (or have used) for any purpose of the United States under the contract.") Allocation of rights should be a matter of negotiation dependent upon the circumstances and upon the proportion of funding of the data supplied by the Government and the contractor. Further, the time period for expiration of Government Purpose Rights is highly dependent upon the nature of the data involved and the related item, component, or process.

227.403-5(b)(1)(ii)

See comment at 227.403-5(a)(3), above.

(b)(2)

Line 3 - Delete "Either party" and substitute "Parties at any tier"

Line 10 - At the end of the clause, add the following sentence: "The period for subcontractors might not be the same as that for prime contractors."

Reason

To allow for fair negotiation of a GPR period through all subcontracting tiers.

(b)(3)

Line 2 change "execution" to "completion."

Reason

The period of time should commence upon <u>completion</u> of a contract or subcontract. This would allow an adequate GPR period since development contracts normally run from 4-8 years.

Innovation at Private Expense

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227.403-5(d)(1) Specifically Negotiated License Rights

At the end of (1), add the following: "Specifically negotiated license rights can apply to subcontractors only through negotiated agreement with that specific subcontractor."

Reason

Special license rights must be negotiated with the owners of the data.

(d)(2)

Line 5, after "... such rights.", add "Negotiations shall include all subcontractors who are owners of the subject data."

Line 11 change "prior to negotiating... such as " to "Prior to negotiating for additional rights in limited rights data, consider the guidelines in Defense FARS Supplement (DFARSS) No. 6, "DOD Spares Breakout Program, and such alternatives as --."

Reason

This limits the risk of the prime negotiating away the rights of their subcontractor's data.

227.403-5(d)(2)(iv)

Add new section that reads: "(iv) Negotiation of long-term reprocurement spares pricing agreements."

Reason

To add another alternative for use by subcontractors and suppliers.

227.403-7 Use and Non-Disclosure Agreement

(c)(1)(b) - At lines 7 and 8 delete "Contractor" and substitute "owner of the data." Also at line 7, delete "Recipient" and substitute "Government."

At line 9, delete "Contractor's."

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Reason

The government, rather than the recipient should make notification and such notification must be to the owner of the data, for clarity purposes.

227.403-8(b) Deferred Ordering

At line 2, after "software", add "in all research and development contracts."

At line 13, after "data", add: "that the Government has already paid for".

Reason

Both parties should know what data requirements are present at the outset of the contract, via negotiation. By adding "paid for by the government," contractors are restricting government access to only that data which the government pays for. Consistent with DFARS 252.227-7017 provisions when data generated at private expense is ordered, the cost for delivery of such data shall be negotiated with the contractor. Private expense data includes costs greater than those of delivery and reproduction.

227.403-10 Contractor Identification and Marking of Technical Data to be Furnished with Restrictive Markings

(a)(1) - At line 4, after "award" add: "to the extent known"

Reason

Consistency with 7017.

(a)(5) - Delete first sentence and "However,".

Reason

Contrary to statutory disallowance of the requirement to submit unlimited data rights as a consideration for award. [10 USC 2320 (a)(2)(F)]

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227.403-12 Government Right to Establish Conformity of Markings

(a)(2) Nonconforming markings:

At line 12, delete "or strike."

At last line, delete the period and add: "as agreed upon by the Contractor."

Reason

If the contracting officer desires to "strike" the legends he should be required to go through the validation process.

(b)(1) Unjustified markings: Second sentence, at line 8, delete "either", delete "... or with mixed funding (situations under which the Government obtains unlimited or government purpose rights)"

Reason

Clarity of the example.

(b)(2) - At line 2, delete "unjustified" and substitute "restrictive." Also at line 2, after "markings." delete the period and add: "in accordance with the provisions of the clause at 252.227-7037, Validation of Asserted Restrictions."

Reason

"Unjustified" may only be established through the validation procedures.

227.403-13 Government Right to Review, Verify, Challenge and Validate Asserted Restrictions

(c)(2)(i) Pre-Challenge Requests for Information - At line 6 delete "determine...assertion." and substitute "ascertain the basis of the restrictive marking."

At line 10, delete "establish" and substitute "justify."

Reason

To agree with DFARS 252.227-7037(c)(1).

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(c)(2)(ii) - At line 4 delete "does not" and add: "and any other available information pertaining to the validity of a restrictive marking do not"

Reason

To agree with DFARS 252.227-7037(c)(2)

(c)(3) - line 6 after "transact," add "pre-challenge,"

Reason

To allow subcontractors to participate in all levels of the validation process.

(c)(3)(ii) - At lines 3 and 4 change "would...restrictions;" to "may inhibit the Government's ability to resolve the issue;"

(c)(3)(iii) - Line 1, add: "If the Contracting Officer takes action through the prime contractor, the Contracting Officer shall grant appropriate time extensions to allow the subcontractors/suppliers to submit a timely response.

Reason

Until the subcontractor actually receives the challenge, the validation process cannot effect the subcontractor's rights.

227.403-14 Conformity, Acceptance, and Warranty of Technical Data

(b)(2)(i) - At line 2 after "may" add "be."

Reason

Correction of clerical error.

227.403-15 Subcontractor Rights in Technical Data

(a) Add reference to DFARS 252.227-7015, "Technical Data - Commercial Items."

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Reason

Clarification.

(c) - In line 4, delete "parties" and substitute "party supplying the data."

In line 6, after "requirement", add: "These clauses convey rights in technical data to the Government only."

Reason

To clarify that rights of use are granted to the government only.

CLAUSES

252.227-7013 Rights in Technical Data — Noncommercial Items:

As found in 252.227-7013 please delete all references to "modify" or "modification" in the following:

(a)(12)(i), line 1	(b)(5)(ii), line 2
(a)(12)(ii), line 3	(b)(6), line 8
(a)(13), line 1	(f), line 2
(a)(15), line 1	(f)(2), within the legend
(b)(3)(iii), line 3	(f)(3), within the legend

(a)(7) - At line 2, after "with", delete the remainder of the subparagraph and substitute:
"... costs charged to indirect cost pools, <u>direct</u> costs not <u>charged</u> to a government contract, or any combination thereof."

Reason

The first phrase of the (a)(7) definition, as originally written, refers to all indirect cost pools including IR&D and B&P, which are allocated across all contracts, including Government contracts. The second phrase, as originally written, would disallow those very indirect cost pools as private expense because they are allocated to Government contracts. This would act to always create a mixed-funding situation and to cancel the very effect that the writers of the regulation are seeking. The recommended changes allow the language to refer to direct costs which are not charged against a government contract. This change then establishes two, discrete categories of private expense costs. These are the only categories of costs to be

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considered and the clarifying words are required to ensure proper understanding. The changes were considered necessary by DCAA and ex-DCAA auditors who would normally be involved in the issue.

Only indirect costs are "allocated" to contracts; direct costs are "charged" to contracts. The costs in the indirect cost pools are the costs that are so allocated.

(a)(7)(ii) - Line 6 (last line), after "expense", add: "unless the contracting officer has agreed otherwise."

Reason

This is not an unusual occurrence and especially in the event where an unfunded change leads to an overrun, the opportunity to negotiate an allocation of rights should be available.

(b)(1)(ii) - Line 3-4 change "specified... performance" to "paid for with Government funds."

Reason

To agree with Subpart 227.4.

(b)(2)(i) - At line 1, begin first sentence with "Except as provided in paragraphs (b)(1) and (b)(3) of this clause,"

Reason

To conform with the rest of the clause and for clarity.

(b)(2)(ii) - At lines 1-2 change: "The five...of the" to: "The government purpose rights period shall commence upon completion of the".

Lines 8-10 change "the five...technical data." to "the government purpose rights period, the Government shall have such rights in the technical data as have been negotiated with the contractor."

Reason

See comment at 227.405-5(1)(9).

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(b)(3)(i)(A) Limited Rights - At lines 2 and 3 delete "and marked with the limited rights legend."

Reason

Legends describe rights but do not convey them.

(b)(3)(ii) - At line 5 delete "Contractor" and substitute "owner of the data."

Reason

It is the owner of the data, not the prime contractor, who needs this notification.

(b)(3)(iii) - At lines 8-12

Change: "..contracting officer..in a license"

To: "...contracting officer and with any subcontractors or suppliers involved to determine whether there are acceptable terms for transferring such rights. All technical data in which the Government has then been granted additional rights by the owners of the data shall be listed or described in a license...."

Reason

To clarify the role of subcontractors and suppliers.

(b)(4) - At line 6, delete "parties" and substitute "government and any owners of the technical data."

(e)(3) Identification and delivery of data to be furnished with restrictions on use, release or disclosure:

At line 3 delete "unless the inadvertent omissions would have materially affected the source selection decision"

Reason

10 U.S.C. 2320(a)(2)(F) - Violative of this statutory language.

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(e)(4)

At line 5 delete "reserves the right to add the" and substitute "shall add all reasonable."

Reason

Must do so to protect owner of the technical data.

(f)(2) Marking Requirements:

Within the legend, add "subcontractor/supplier" to "contractor name"

(f)(3).

Within the legend, add "subcontractor/supplier" to "contractor name" Reason

Necessary to know to whom the challenge or questions are to be addressed.

(g) Contractor Procedures and Records:

At line (1), delete "throughout performance of this contract".

(g)(1), line 1 begin first sentence with "Throughout performance of this contract,"

(g)(2), line 1. Begin the first sentence with "Throughout the validation period of 252.227-7037."

Reason

Clarification. If the contract has already been performed, the government has three years to challenge.

(k) Applicability to Subcontractors or Suppliers

(k)(4) - At line 1, delete "will" and substitute "shall"

Reason

Required to ensure compliance with appropriate statutory language. See 10 U.S.C. 2320 (a)(2)(F).

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CLAUSE

252-227.7015 Technical Data - Commercial Items

As found in 252.227-7015, please delete all references to "modify" or "modification" on the following:

(b)(1), line 1

(b)(2), line 2

(b)(1)(i), line 2

(c), line 3

(b)(1)(iv), line 3

(d), line 7

(a)(1)(iv) - Line 1 delete "(b)(1), (2), or (3)," and substitute "(a)(1)(i)(ii) or (iii)."

Reason

Referenced section (b)(3) does not exist; other references are inappropriate.

(b)(1)(i) - Line 5 delete "software" and substitute "technical data"

Reason

Correction of clerical error.

(b)(1)(ii) - after "data", add: "describing the commercial end unit"

Reason

Without this addition, the interpretation of "form, fit and function" could reach down into piece part level. If that is what is meant, that is what should be said.

(b)(2)(i) - At line 2 change "items," to "item or any of its parts;"

Reason

Without this addition, the clause could reach down into piece part level. If that is what is meant, that is what should be said.

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(b)(2)(ii) - At line 3, add "written" between "express permission".

Line 6, after "contract", add "and the Contractor is unable to meet the Government's needs."

Reason

To safeguard the position of the parties.

(c) - Delete

Reason

Impractical. Also inconsistent with the structure of every other data clause.

(d) Release From Liability

There should be a brief marking requirement that would support the government's position under this clause.

CLAUSE

252,227-7016

As found in 252.227-7016 please delete all references aid "modify" or "modification" in the following:

- (c)(1), line 3
- (d)(1), line 4
- (d)(2), line 2

(a)(2) - At line 1 before "contracts" add "solicitations and "

(a)(3) - At line 1 before "contracts" add "solicitations and"

Reason

To extend protection to solitications.

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(c)(1) - At line 2, after "clause," add "as provided in the resulting contract."

(e) - Last line, delete "parties" and substitute "party owning the data."

Reason

If the government does not select the contractor for award, it should not have any rights in their data.

CLAUSE

252,227-7017

- (b) In line 1, delete "notification and". After "identification", add: "and assertion".
- (e) In line 2, delete "notification and". After "identification", add: "and assertion".

Reason

To agree with the clause title.

(e) - At line 3, after "offer" add "and after request to do so by the contracting officer,"

Reason

227.403-10(a) states that failure to do this is only a minor irregularity.

(g) Add new subparagraph (g):

"This identification and assertion required by paragraph (d) may be updated with other assertions identified after contract award when based on new information or inadvertent omissions."

Reason

Consistency with 227.403-3(c).

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CLAUSE

252,227-7025

As found in 252.227-7025 please delete all references to "modify" or "modification" in the following:

(b), line 4

(b)(3), line 1

(b)(1), line 1

(c)(1), line 5

(b)(2), line 6

New (c): Add the following:

(c) Upon completion of the work under this contract, the contractor shall return all GFI marked with limited or restricted rights legends or, with permission of the contracting officer, shall destroy such GFI and certify such destruction in writing to the contracting officer.

(c) - Change to (d)(i) and (ii)

Reason

It is necessary to ensure that copies of data with restrictive markings do not remain in possession of third parties.

CLAUSE

252.227-7028

In line 2 delete "documents on other media incorporating".

In lines 4-5, delete "or substantially similar to documents or other media" and substitute "technical data or computer software."

In line 6 delete "produced for"

Reason

Clarification. This is beyond coverage of the clause; government rights are fully covered in "delivered to" or "obligated to deliver" language.

(a) - Delete. Change "(b)" and "(c)" to "(a)" and "(b)"

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Reason

We are only dealing in the context of the contract requiring <u>delivery</u>, not <u>production</u> of data.

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Appendix B -- (Long-term Comments)

Protection of Data Rights when Data is Stored in Electronic Media:

The marking requirements fail to take into consideration the creation of electronic data bases IAW MIL-HDBK-59B, CALS Implementation Guide, and the subsequent use, storage, and delivery of individual data elements from that data base IAW MIL-STD-974, Contractor Integrated Technical Information Service (CITIS). As written, the restrictive legends and instructions for their application presuppose that technical data is presented in a paper or microfilm medium (i.e., hard copy). In fact, application of these legends becomes unwieldy, if not useless, when data is recorded on electronic media (e.g., diskettes, tapes, optical disks) or is accessed from a CITIS. For example, the technical data that comprises an electronic engineering drawing file is not viewed, as it is on paper, "through" a drawing format that includes legends, title blocks, revision blocks, etc. Instead, the format information is usually placed in a separate section, or overlay, of the drawing file for reference. It then becomes possible for those using the electronic data file to never see the legend even though they have been using the file and to copy the technical data without the section including the legend.

Legending software that is part of a weapon system component is also difficult, if not impossible, under the regulation's requirements. Owners of technical data and of the attendant data rights are told that we must legend the software if we are to maintain a claim to restricted rights, but that we must not use a restricted-rights legend when it would impede the use of the software program itself. How then are we to maintain restrictive rights and "legend" a program that is embedded in an E-prom in an engine control unit, or a program that is, itself, the engine control?

It is also necessary to define the "granularity" of data at which data rights are to be identified. (Granularity can be defined along a continuum from as large as an entire data base, to an individual drawing file, to as small as each datum in the data base. In a CITIS, for example, it would be possible for a DoD user to gain access to an integrated data base, withdraw technical information that is used on an engineering drawing as well as in ILS reports and other technical publications, and use it in some way. He must have some way of knowing if there are restrictions on any of the data that he has accessed. By tying legends to the data end-products (reports, drawings, etc) rather than to the data that goes into them, he will not be able to discover what his limitations are. Since today's DoD contracts contain requirements for CALS and CITIS activities, there is urgency to an answer to this question. If the means to

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maintain data rights claims (i.e., listing and legending) do not offer industry the actual, practical ability to protect proprietary data in the electronic environment, it would become a violation of 10.U.S.C. 2320 to require such delivery.

Adapting the regulations to commercial products and customers:

The regulations, despite the new changes, are still not conducive to the participation in Government contracting of high-quality commercial contractors that develop at private expense. For example, 10 U.S.C. 2320 allows the Government to obtain rights in technical data and computer software that encompass the concepts of "use, release, and disclose." These concepts were part of the ASPR and the DAR language that predated the 2320 statute and were carried into the regulatory language in the FAR and throughout the various versions of the DFARS to date. The latest version of the DFARS, however, adds the concepts of "modify, reproduce, perform, and display" to the types of usage the Government would be allowed in general in technical data and computer software. It would seem that these generalized additions to the list of usages are meant to strengthen the concept of rights in copyrighted material (including ADPE software), especially the problem of creating derivative works.

By inserting these usages throughout the rights regulation and not limiting them to copyrighted material, however, the DoD creates the probability of damage to the foundations of the technical data process. The problem is especially serious in the matter of creating a general "right" to "modify" technical data. It is far less of a problem to modify a motion picture created to teach hygiene to DoD troops than it is to modify a drawing of a proprietary detail part of the guidance mechanism of a fighter aircraft. Modification presents a major problem for contracts in which an original equipment manufacturer (OEM) remains the design control authority (DCA) for the procured item. If the Government can unilaterally modify the technical data that describes the item or component, the OEM cannot then maintain the currency of that data or warrant its accuracy. If such right of modification is then extended to third parties, as in government purpose rights (GPR) situations, the problems become even more grave. The OEM will be unable to comply with 10 U.S.C. 2320 (b)(6), which requires that:

"...the contractor [is required] to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the

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items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract..."

The issue is also of grave concern in certain software situations. Unilateral modification by a Government agency of a word-processing program for the advantage of its local users is of much less consequence than unilateral modification by a Government agency of the software program that itself comprises a component of a weapon system. This second case of modification, which amounts to a Class 1 change, must be accomplished only on a bilateral or multi-lateral basis that includes the OEM/DCA to ensure that changes do not endanger the operation of the program and ultimately of the weapon system itself.

One solution to this problem could be that the "rights" to modify, reproduce, perform, and display are plainly limited to copyrighted material that does not carry any other data rights restrictions related to trade secret status. This compromise would meet the Government's needs in items such as motion pictures, music, and ADPE software without endangering the integrity of industry's technical data. If such limitations are not possible, another solution could be to limit the "right" of modification to that technical data and computer software for which the Government has become the DCA. This would relieve the original owner of their data from the impossible task of keeping up with changes made by others and would relieve that owner from unfair data warranty requirements.

Rights in Computer Software

There is a general underlying problem regarding the treatment of computer software and computer software documentation throughout these regulations. Although they will operate reasonably well when the Government licenses third-party commercial software programs for use on its ADPE, these regulations are laced with difficulties when applied to the purchase of computer programs related to items or components that are part of weapons systems.

First, the problems of marking requirements for a digital product such as a software program and of modification of software programs that are part of a weapon system are discussed above. Second, the basic restricted rights as defined in 252.227-7014 properly allow for the use of software programs in data-processing computers but do not take into account the requirements to use a software program that is the engine control aboard a fleet of aircraft. Third, to expect all software documentation — including design documentation — to be delivered with unlimited rights is to fail to

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recognize that documents such as Software Design Documents are as detailed, and as proprietary, as any Engineering drawings or manufacturing process descriptions.

Reducing the cost of administration

This body of regulation, in the attempt to cover wide possibilities, has created a complex and expensive administration requirement. These costs are leveled on the contracting community -- from prime contractors to small subcontractors -- and on the Government. The entire structure could be reshaped with savings in mind. For example, if the negotiation and validation of data rights designations were completed during the life of the contract, without need for a later validation process, the contracting community and the Government would be relieved of the necessity of record retention and auditing over the long period of time prescribed by the current validation process. This would also encourage participation in DoD programs of the innovative subcontractor which, with the proposed regulation, remains apprehensive about its ability to protect its proprietary interests and forgoes such participation.



RELIANCE GEAR CORPORATION

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August 11, 1994

Mr. Robert Donatuti Deputy Director for Major Policy Initiatives 1200 S. Fern Street Arlington, VA 22202-2808 Attn: Ms. Angelena Moy, OUSD(A&T)/DDP

SUBJ: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. We have been doing this since 1965. We are a small company and are not able to devote a lot of engineering time in the manufacturing of these gears. We rely heavily on all the facts being on the prints and/or specs provided to us by our customers and prospective customers.

We at Reliance Gear Corporation are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the empact of this change on competition and our tax dollars.

We are concerned about the following:

- Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.
- Data charged to an indirect pool will become proprietary to the We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMS will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

(Continued on Page 2)

We are aware of contentions that these changes will only affect tuture development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data <u>developed--according to any formula--with any of our tax dollars.</u>

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the \$500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

L. R. Maros

Reliance Gear Corporation

LRM:ck

SAXON CORPORATION

2047 WEST MALONE SAN ANTONIO, TEXAS 78225 P.O. DRAWER BB SAN ANTONIO, TEXAS 78211

August 5, 1994

Deputy Director for Major Policy Initiatives 1200 S. Fern Street Arlington, VA 22202-2808 ATTN: Ms. Angelena Moy OUSD (A&T)/DDT

Subject: DOD Proposed Rules, DAR Case 91-312, Data Rights

Dear Ms. Moy:

The Saxon Corporation does not support the recommendations that are being proposed in DAR Case 91-312. We are a small business and have survived for over two decades by providing the Department of Defense with a capability to repair Government assets at the best prices and at a level of quality that is difficult to match - both inside and outside the Government.

Virtually all of our business is conditioned on the unlimited use of and access to technical data and technical orders required to perform maintenance and repair on Original Equipment Manufacturers' products that the DOD uses to accomplish its daily mission. Although the OEM's can do the work themselves, the rigors of competition have established The Saxon Corporation as a source that can do it better and cheaper. However, some of the changes which the "807 Committee" is proposing has the potential of denying us the opportunity to compete for this business in the future. What we find troublesome is the Committee's decision to allow indirect costs to be treated as private expenses. Where all or part of a development is funded with private expenses, rights to the data become either limited to the developer only, or subject to Government purpose restrictions.

Limited rights obviously mean that requirements for maintenance or repairs would be restricted to the company that originally made the equipment. Even if the Government funded all the development, any portion paid out of an indirect cost element would add a private fund to the mix, thereby yielding Government Purpose Rights. We know from experience that once a solicitation has been announced, there is not enough time for us to secure and execute a non-disclosure agreement before the contract is awarded. Therefore, even when the Government (read "taxpayer") pays for all development, no one but the developer will be allowed to present a proposal. This does not make good business sense, much less good procurement sense.

I have been retired from a Senior Executive Service position at Kelly AFB, Texas for five and a half years. For the last six of my thirty seven years with the Air Force, I served as the Deputy Director of Contracting at Kelly AFB. During my tenure in this position, the procurement system underwent tremendous change some of which came about only after much resistance and acrimony. But what these changes did during the 1980's was to create a system of competition within DOD that resulted in far better support to the field than we had ever had, superior prices that saved Kelly AFB alone hundreds of millions of dollars each year, and a renewed confidence in a previously flawed procurement system that gave hope to both Government and contractor personnel that competition does work. I struggled daily to make every one of my employees an advocate of competition - and we succeeded.

I stay close to the Government's business. My company depends on What I have seen over the past five years is a very concerted effort on the part of major defense contractors to undue all those years of effort that yielded a workable competitive procurement system. Engine parts that were once competed among four, five or six companies are now too "critical" to compete. They must be bought from only the engine manufacturer; forget that competitor's parts have been flying in Air Force engines for ten years. I have seen the size of the Competition Advocate Office reduced from over 300 people to less than 30. I have seen repair requirements for which we competed for years be held up because companies had to attempt to "re-qualify", often unsuccessfully. Now I see the Department of Defense capitulate to the prime contractors by rewriting data rights regulations that have no other ostensible purpose than reducing or eliminating competition. Why else would the primes have made these changes such a priority?

I appeal to those in a position of authority or influence within the Defense Department to resist an extremely deleterious change to data rights regulations that can only put companies such as mine out of business, not to mention what effect it is going to have on the taxpayers of the country. We worked hard to make the procurement system work, through competition, better prices and better support. Please don't permit the OEM's to undo all our efforts.

Regards, THE SAXON CORPORATION

Horken

Robert L. Blocker Vice President

Copy:

- Congressman H.B. Gonzales

- Congressman R. Dellums (HAC)

- Congressman J. Murtha

-- Senator S. Nunn (SAC)

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August 17, 1994

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*NOT ADMITTED IN VIRGINIA

BY FEDERAL EXPRESS

Deputy Director
Major Policy Initiatives
OUSD (A & T)/DDP
1200 S. Fern Street
Arlington, VA 22202-2808

ATTN: Ms. Angelena Moy

Re: DAR Case 91-312

Dear Ms. Moy:

I am writing in response to the notice of proposed rulemaking published in the *Federal Register* of June 20, 1994, for DAR Case 91-312. The proposed rule is that recommended by the § 807 DoD/Industry Technical Data Advisory Committee.

poD should not adopt the proposed rule. If adopted, this proposal would result in:

DoD again purchasing overpriced spare parts from OEMs on a noncompetitive basis;

DoD imposing its noncompetitive practices on domestic commercial markets and our allies;

a loss of U.S. manufacturing capability and jobs as OEMs send work previously performed by more efficient small business manufacturers abroad to satisfy offset agreements and other arrangements.

These points are discussed in detail below.

I. § 807 Recommendations Would Lead to a Return of Spare Parts Abuses

An acid test of any procurement policy is whether the taxpayers get what they pay for. The § 807 recommendations should be rejected because they fail this test.

Deputy Director
Major Policy Initiatives
OUSD (A & T)/DDP
August 17, 1994
Page 2

Taxpayers would not get what they pay for. Data rights would turn upon how development was charged, rather than whether development was paid for by DoD.

In a totally bizarre arrangement contractors could claim rights in data for items, components or processes paid for by DoD, by charging development to DoD as an indirect rather than direct cost. This practice would enable a so called "original equipment manufacturers" (OEMs) to preclude more efficient (lower priced) small business manufacturers, from competing against them for DoD, commercial and direct sales to foreign government.

No accounting changes are needed for an OEM to avail itself of this government giveaway. OEMs already charge the development of manufacturing process specifications essential for competition as an indirect expense. Also, FAR § 31.202(b) and CAS § 402.50(e) permit minor amounts of otherwise direct expense to be charged indirect for reasons of practicality.

OEMs can use creative accounting to obtain additional benefits and keep more data paid for by the taxpayer. Costs the government considers direct may be charged indirect if a contractor's disclosed accounting practices charge development to cost objectives other than a Government contract. CAS does not preclude a contractor from changing its accounting practices to charge costs previously charged direct indirect.

The indirect cost issue is discussed in more detail in my commentary in the April 13, 1994, Government Contractor entitled "'What's Mine is Mine and What's Yours is Mine' - The Return of Overpriced DoD Spare Parts" at pp. 8 - 10. A copy is enclosed and its entire contents incorporated in these comments.

Provisions under which OEMs would serve as data repositories should also be rejected. Such provisions would place OEMs in an untenable conflict of interest situation because they would benefit from not providing data to potential competitors.

- II. § 807 Recommendations Would Impose DoD's Noncompetitive Practices on Commercial Markets and Our Allies. Additional Costs Will Be Borne in Part by U.S. Taxpayers
- § 807 proponents contend that the recommendations will further the use of dual use technology and DoD purchase of commercial products. Instead the recommendations would result in DoD imposing its noncompetitive regime on commercial markets.

Deputy Director
Major Policy Initiatives
OUSD (A & T)/DDP
August 17, 1994
Page 3

As previously discussed, OEMs would be able to claim limited rights in data by charging all development costs indirect. In addition to forcing DoD to purchase noncompetitively, this would preclude competition on a large number of commercial and direct foreign government purchases.

OEMs will be able to even further restrict competition for commercial and foreign government procurement by charging an insignificant portion of development costs indirect. Under the proposal, the Government would be limited to Government Purpose Rights (GPR) where even 1 penny of development costs are charged indirect. GPR cannot be used to compete for commercial requirements or direct sales to foreign governments.

In sum, the problems are that: (1) no contractor contribution is required to claim GPR if development is charged to indirect costs, and (2) even if the indirect cost giveaway did not exist, the percentage of contractor financed development required to claim GPR is too low. Once again, John Q. Taxpayer does not get what he paid for.

DoD justifies the GPR giveaway on grounds that foreign Government and commercial customers are not its concern. DoD contends it is not its concern if foreign Government and commercial customers pay more.

DoD's argument ignores that much of these costs are ultimately born by the U.S. taxpayer. Foreign government purchases of military equipment are often paid for with funds from U.S. grants in aid. The flying public (taxpayers) will pay higher fares as airlines pass the cost of overpriced spare parts through to them.

The small business manufacturers that use data paid for by the taxpayer to create cost saving competition are taxpayers too. There is no reason that they should not be able to use items, components or processes developed at taxpayer expense for legitimate business purposes.

Based on the above it is recommended that DoD: (1) not adopt the indirect cost giveaway; and (2) require that a contractor pay for more than one half of development costs to claim GPR.

III. § 807 Recommendations Would Lead to a Loss of U.S. Jobs and Manufacturing Capability

The § 807 proposal ignores the role small business manufacturers play in the defense industrial base and as

Deputy Director
Major Policy Initiatives
OUSD (A & T)/DDP
August 17, 1994
Page 4

providers of jobs. Small business manufacturers, rather than the OEMs, are U.S. manufacturing capability. OEMS, for the most part, purchase parts for assembly of weapons systems or for resale at a markup.

The § 807 proposal will result in DoD again purchasing noncompetitively from the OEMs. The OEMs are unlikely to subcontract manufacture to these small businesses as they did before competition was mandated by 1984 legislative reforms. Instead, they would likely follow their recent practice of subcontracting abroad to satisfy offset agreements and other arrangements. As a result U.S. jobs and manufacturing capability would be lost forever.

CONCLUSION

The § 807 Committee recommendations should be rejected. They are contrary to the public interest because U.S. taxpayers would not get what they pay for.

Thank you for the opportunity to present my views. If you have any questions, or need additional information, please let me know.

Sincerely,

Paul J. Seidman

Enclosure

The Government Contractor

information and analysis on the legal aspects of procurement for contracts professionals



* "'What's Mine Is Mine and What's Yours Is Mine'-The Return of Overpriced DOD Spare Parts"—In 1984, legislation was enacted to end DOD's noncompetitive purchases of overpriced spare parts. Such legislation includes the Competition in Contracting Act (P.L. 98-369), the Defense Procurement Improvement Act of 1984 (P.L. 98-525), and the Small Business and Federal Procurement Competition Enhancement Act of 1984 (P.L. 98-577). As a result, so-called "original equipment manufacturers" (OEMs) lost the replacement parts market to more efficient small business manufacturers. After the enactment of these reforms, the small businesses that had fought for them returned to their factories. For the next 10 years, they provided DOD with highquality parts at a fraction of the prices previously paid the OEMs. Meanwhile, representatives of the OEMs remained in Washington and lobbied for legislation to regain the spare parts business lost to competition. One result was enactment of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (P.L. 102-190) which called for the creation of the § 807 Government/ Industry Technical Data Committee. Appointments of industry members to the Committee were largely from the OEM community. As a result, the Committee's technical data rights recommendations largely favor the interests of the OEMs.

The OEMs contend that adoption of the Committee recommendations will encourage "dual use technology" and the purchase of commercial products. However, as discussed in more detail below, adopting the § 807 Committee recommendations will cause substantial harm. There are three fundamental reasons. First, the Committee's recommendations, if adopted, will result in DOD once again purchasing overpriced spare parts from OEMs on a noncompetitive basis. Second, the rec-

ommendations will result in DOD imposing its own noncompetitive practices on our domestic commercial markets and on sales to our allies. *Third*, U.S. manufacturing capability and jobs will be lost.

Overpriced Spare Parts—Under the current provisions of the DFARS, particularly DFARS 227.402-72(a), "Rights in Technical Data—Unlimited Rights," DOD is entitled to unlimited rights in data (1) required for the performance of a Government contract or (2) pertaining to items, components, or processes developed exclusively at Government expense. Unlimited rights data are in the public domain and can be used for any purpose, including competing for DOD, commercial, and foreign government requirements (see DFARS 227.401(19)).

Under the § 807 Committee's recommendations—particularly DFARS 227.403, "Noncommercial items or processes," and the contract clause found at DFARS 252.227-7013, "Rights in Technical Data—Noncommercial Items," DOD would continue to be entitled to unlimited rights in data developed entirely at Government expense. DOD would, however, no longer be entitled to unlimited rights in data required for the performance of a Government contract. Moreover, DOD's technical data rights would turn in large part upon whether development is charged to DOD as a direct or indirect cost—a potential source of significant abuse.

The potential for abuse lies in the Committee's recommended definition of "private expense." Under the Committee's recommended regulation and clause, indirect costs charged to a Government contract and paid for by DOD would nonetheless be treated as private expense (see recommended DFARS 252.227-7013(a)(7), (9)). Where an item, component, or process is paid for entirely at private expense, the Government would have only limited

rights in the technical data pertaining to it (see recommended DFARS 227.403-5(c)). Limited rights data could not be used for competitive purposes as the data could not be disclosed or released outside the Government (see recommended DFARS 252.227-7013(a)(13)).

Moreover, even where only a portion of development is claimed to have been at private expense. the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (see recommended DFARS 227.403-5(b)) as opposed to unlimited rights unless otherwise negotiated under existing regulations. Under the proposed regulations, an OEM would be able to limit DOD to GPR by paying for (or charging as an indirect cost) an insignificant portion of development while DOD funds the rest. Although a competitor could use GPR data to compete for DOD contracts, it could not use it to compete for commercial or direct foreign government sales (see recommended DFARS 252.227-7013(a)(11),(12)). Competition on DOD procurements would also be limited under the Committee's recommended changes because there is no mechanism in place or provided for to permit potential competitors timely access to GPR data. Specifically, in order to compete, alternate sources need access to pertinent technical data before a solicitation is issued to obtain necessary source approvals and to submit a timely bid or proposal. Small business manufacturers currently use the Freedom of Information Act and agency "cash sales" programs to obtain this data before a solicitation is issued. Since GPR data are proprietary to the OEM, that data could be withheld under FOIA Exemption 4 governing confidential business information and not releasable under "cash sales" programs.

Thus, under the Committee's recommendations, DOD would be entitled to unlimited rights—i.e., the right to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so (see recommended DFARS 227.252.7013(a)(15))—only in data pertaining to items, components, or processes paid for in full by the Government as a direct cost under a particular contract. Allocating technical data rights on the basis of the classification of the underlying costs as direct or indirect will severely limit the avail-

ability of technical data to spare parts manufacturers. This will in turn limit competition for these parts and facilitate pricing abuses. It follows, therefore, that when the OEMs speak of protecting "their" data, they are now referring to data whose development costs were charged to DOD as indirect expenses and paid for by the taxpayer. In other words, "what's mine is mine and what's yours is mine."

The current FAR cost principles, the Cost Accounting Standards, and the case law permit OEMs to charge what can be significant amounts of design and development costs to indirect accounts. No accounting changes may be needed for OEMs to charge certain development costs indirect and thereby preclude competition. For example, OEMs commonly charge the development of manufacturing process specifications essential for competition to DOD as indirect manufacturing and production engineering (M&PE) costs under FAR 31.205-25. So long as the Government's rights in technical data did not turn on the manner in which M&PE was charged, how OEMs charged them was not critical from a competition standpoint. Where as now, however, the Committee has recommended changing the method for allocating technical data rights, the OEM's practice is crucial. It is not surprising, therefore, that OEMs fought stridently to have indirect costs, particularly M&PE, characterized as private expense and to thereby limit the Government's rights in the data and competition.

Costs other than M&PE expenses also may be charged indirectly. FAR 31.202(b) and CAS 402.50(e) permit "minor" amounts of otherwise direct costs, such as the costs of design development activity, to be charged indirect for reasons of practicality. This provides another means for an OEM to preclude data, whose development was paid for by the Government, from being used for competitive procurement purposes. The "minor" amounts of otherwise direct costs that can be charged indirect under this rule can be substantial. In Sperry Gyroscope Co., ASBCA 9700, 1964 BCA ¶ 4514, the Board held that \$136,000 in otherwise direct pre-1964 development dollars could be charged indirect under this exception. How far the OEMs will be able to push this "minor amount" exception to direct charging in order to claim rights in data paid for by DOD is unclear.

Furthermore, costs that the Government

Vol. 36, No. 15 / April 13, 1994

views as direct development costs may nonetheless be chargeable indirectly in accordance with an OEM's disclosed accounting practices. CAS 418.30(a) defines a "direct cost" as any cost that "is identified specifically with a particular final cost objective." Thus, "[a]ll costs identified specifically with a contract are direct costs of that contract," and "[a]ll costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives" lemphasis added). Although the case law is murky, significant amounts may be chargeable indirect under this definition and under cases holding that cost objectives are determined by a contractor's accounting system rather than contract requirements (see Texas Instruments, ASBCA 18621, 79-1 BCA ¶ 13800, affd., 79-2 BCA ¶ 14184, and Boeing Co. v. U.S., 862 F.2d 290 (Fed. Cir. 1988), 7 FPD ¶ 160; see also, Goodrich, "Identifying Final Cost Objectives & Classifying Direct Costs," 91-7 CP&A REPORT 3 (JULY 1991)). Costs charged to a cost objective other than a contract are considered indirect costs unless a contractor elects to reallocate them from an intermediate cost pool to the contract as a direct charge (see Shapiro, "Direct vs. Indirect Costs-A Choice," 89-2 CP&A REPORT 3, 8-9 (Feb. 1989)). Accordingly, a contractor could treat development expenses as indirect costs provided those costs benefit multiple final cost objectives under the contractor's accounting system.

Additionally, the CAS do not preclude a contractor from changing its accounting practices to charge costs previously charged direct indirectly, thereby preventing DOD from obtaining rights in data necessary for competition notwithstanding that the items, components, or processes were developed at taxpayer expense (see FAR 30.602-3). The CAS only require advance notice of a change and that the contractor absorb any increase in contract price. DOD is without authority to withhold approval of a change unless the system, as changed, would not comply with the CAS or with the FAR cost principles (see FAR 30.602-3 and FAR 30.202-7).

Finally, the Committee's recommendations also could be used by an OEM to preclude competition on previously competed spare parts. OEMs continually revise manufacturing process specifications during the life of a weapon system. From time to time, they also make minor design

changes. These manufacturing process and design changes typically are paid for by DOD under component improvement programs. An OEM could preclude competition on previously competed spare parts by charging all or part of the development costs for these minor revisions to DOD as an indirect expense.

In light of the foregoing, it is evident that the Committee's recommendation to allocate technical data rights on the basis of the classification of development costs as direct or indirect will have a detrimental effect on competition and the price of spare parts and presents a serious potential source of charging abuse.

Effect on Commercial and Foreign Government Buyers—Small business contractors use Government-owned technical data to compete for domestic commercial sales and direct sales to friendly foreign governments in addition to DOD requirements. (Direct sales are where a U.S. company sells directly to a foreign government. They are distinguished from sales under the Foreign Military Sales program, in which DOD acts as the purchaser for a foreign government.) If the Committee's recommendations are adopted and OEMs can claim limited rights in data by charging the costs of all development indirect, data currently available to small business contractors would no longer be available to them and they would be precluded from competing on a large number of commercial and foreign government procurements.

Furthermore, under the Committee's proposal, (a) GPR data could not be disclosed by DOD for use in connection with commercial or direct foreign government sales (see recommended DFARS 227.252.7013(b)(2)), and (b) an OEM could limit DOD's rights in data to GPR for five years where it pays for as little as \$1 of development costs itself, or worse, charges that \$1 to DOD as an indirect cost. Therefore, competition by small business contractors on commercial and foreign government procurements would be further eroded at a minimum for the five-year period GPR data would be protected.

The absence of competition will increase costs to commercial and foreign government buyers. Since many direct foreign government sales are funded with U.S. grants-in-aid, the Committee's recommendations would correspondingly increase

costs to the U.S. taxpayer.

Loss of U.S. Jobs and Manufacturing Capability—The inability of small business parts manufacturers to obtain vital information as a result of the Committee's recommendations will likely result in the loss of many jobs. Specifically, an often-overlooked fact is that small businesses rather than OEMs are U.S. manufacturing capability. The OEMs for the most part are not manufacturers but rather are "assemblers," "dealers," or "importers." They purchase parts from others and then assemble them into weapon systems or, after adding a hefty markup, merely resell them as replacement parts.

Until recently, the OEMs purchased parts from domestic small business manufacturers. Increasingly, however, they have been entering into offset agreements with foreign governments that require them, as a condition of sale, to subcontract abroad. As a result of these offset agreements and other arrangements, OEMs are increasingly purchasing parts abroad. If the § 307 Committee recommendations are adopted, contracts previously awarded to domestic small business parts manufacturers will be awarded noncompetitively to OEMs because small businesses will be unable to obtain critical

manufacturing information. The OEMS will subcontract their work abroad. U.S. jobs and manufacturing capability will be lost forever causing substantial harm to the U.S. economy and defense industrial base.

Conclusion—The recommendations of the § 807 Committee will result in increased costs to the taxpayer, as well as a loss of U.S. jobs and manufacturing capability. As stated in the Minority Report of Committee Member Nick Reynolds, President of the Independent Defense Contractors Association: "Given a reduced defense budget, one would think that the politically astute thing for DOD to do would be to take steps to maximize its 'bang for the buck'. In today's economic scenario, DOD does not serve itself well playing Santa Claus to large defense contractors at the expense of the taxpayer."

The foregoing comment was prepared for THE GOVERNMENT CONTRACTOR by and contains the opinions of Paul J. Seidman. Mr. Seidman is a principal in the law firm of Seidman & Associates, P.C., McLean, VA, and represents companies competing against OEMs for spare parts procurements. He serves as procurement policy counsel to the Independent Defense Contractors Association.



Serial 535-SN

August 17, 1994

Deputy Director Major Policy Initiatives 1211 South Fern Street Arlington, VA 22202-2808

Attn: Ms. Angelena Moy

OUSD (A&T)/DDP

Subject: Rights in Technical Data (DAR Case 91-312)

Dear Ms. Moy:

On behalf of the Shipbuilders Council of America, the national association representing American shipyards, marine equipment suppliers, and naval architects, I wish to submit the following comments with respect to the proposed rule on rights in technical data.

On balance, we believe that the proposed rule represents an improvement over existing regulations in that it gives greater recognition to the substantive rights of those contractors which incur expenses associated with technological research and development. Nevertheless, we believe that the following suggestions would further improve upon the proposed rule.

- Paragraph 227.403-4(b): Recommend the word "limited" be changed to "unlimited" in the third line from the end of the paragraph. This is a significant editorial correction.
- Paragraph 227.403-5(b): Recommend that this paragraph be amended to define a reasonable period of time to be more than five years. In this regard, merely stating that a longer period may be negotiated ignores the reality that in a number of instances, some contracting officers simply refuse to negotiate a longer period. Furthermore, as long as the Government has the right to engage in reprocurement from third parties, as it can when it has Government Purpose License Rights, there is no need for the Government to obtain unlimited rights in mixed funding situations after five years.
- Paragraph 227.403-10(a)(5): Recommend deletion of the first sentence that begins with the words "Information provides" and ends with the words "disclosed technical data." This sentence is contradictory to the statement that follows, which states that offerors shall not be prohibited from offering products unless the offeror relinquishes its rights in technical data. To make relinquishing of rights an evaluation factor does act as a force to relinquish rights or be downgraded in the procurement evaluation. In this re-

gard, Paragraph 227.403-1(d), Page 31587, clearly indicates that offerors "shall not be prohibited or discouraged from. . .offering to furnish items. . .developed at provided expense solely because the Government's rights to use. . .technical data. . .may be restricted."

- Paragraph 252.227-7013(a)(7): Recommend deletion of the first sentence that begins with the words "Development exclusively" and ends with the words "any combination thereof" and insert the following in lieu thereof, "Developed exclusively at private expense means development of the item, component or process was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a Government contract as direct costs, or any combination thereof." In this regard, the word "Development" is incorrect. It should read "Developed." (See the definitions in the previous paragraphs.) The reason for this proposed change is that the term "cost not allocated to a Government contract" is contradictory to the objective that charging to indirect cost pools entitles the contractor to retain rights. Indirect costs pools are allocated to contracts. It is assumed that if the term is changed to not allocated to the Government contract as a direct cost, the true meaning will be obtained.
 - Paragraph 252.227-7013(e): Recommend that this paragraph be modified. In this regard, the requirement to identify data on an attachment at the commencement of a contact may be impracticable in major weapons procurements. In many instances, contracts are undertaken on the basis of concurrent development. This paragraph could be interpreted as requiring the contractor to suffer when new information is uncovered after contract award which raises the question of new information versus inadvertent admissions. The requirement for listing of data should be on a best effort basis. The thrust of this paragraph, which indicates that an inadvertent admission would affect the source selection, is counter to the statements elsewhere in the regulation that a contractor may not be forced to give up rights in data in order to obtain a contract.

Sincerely,

S. O. Nunn
Acting President

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August 19, 1994

BY HAND DELIVERY

Deputy Director
Major Policy Initiatives
Office of the Under Secretary
of Defense (Acquisition)
1211 South Fern Street
Room C-109
Arlington, Virginia 22202-2808

ATTN: Ms. Angelina Moy, OUSDA (A&T)/DDP

Re: Comments on Proposed Rule on Defense

Federal Acquisition Regulation Supplement;

Rights in Technical Data

Dear Sir:

This letter provides comments on the proposed rule to amend the Defense Federal Acquisition Regulation Supplement ("DFARS") provisions on rights in technical data. The proposed rule was published in the Federal Register on June 20, 1994. See 58 Fed.Reg. 31584-620 (1994). I commend the Section 807 panel for its efforts on this important subject. On the whole, the proposed rule provides greater clarity regarding the respective rights of contractors and the United States Government in technical data and computer software and this development is to be welcomed.

I am, however, greatly concerned by the expansive scope of the proposed definition for "Government purpose" set forth in proposed DFARS 252.227-7013(a)(11), and the definition of "Government purpose rights" set forth in proposed DFARS 252.227-7013(a)(12). See 59 Fed.Reg. 31605. If adopted, these definitions are likely to result in direct commercial competition between the United States Government and developers of technical data in the area of foreign military sales, which is surely not the intent of the drafters of this rule or of the Section 807 panel. Furthermore, this expansion is contrary to the historic and equitable approach of the United States Government in this area, which has

allowed the developers of data, primarily with their own funds, to exploit that data for commercial purposes, without interference or competition from the U.S. Government.

I. PROPOSED DEFINITION OF "GOVERNMENT PURPOSE"

The current DFARS provisions on technical data rights, DFARS 252.227-7013 (October 1988), does not include a separate definition of "Government purposes." There is, however, a limited definition of "Government purposes" which is embedded in the current definition of Government Purpose License Rights ("GPLR"). DFARS 252.227-7013(a)(14) (October 1988) thus states:

Government purpose license rights (GPLR), as used in this clause, means rights to use, duplicate, or disclose data (and in the SBIR Program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data (and in the SBIR Program, computer software), for commercial purposes.

The current definition of "Government purposes" essentially provides that (1) competitive procurement is a Government purpose subject to GPLR treatment and (2) having or permitting persons outside the United States Government to use technical data subject to GPLR treatment for commercial purposes is impermissible. No mention is made of foreign military sales ("FMS") in this current definition and industry has rightfully assumed that the use of GPLR in this manner would not result in the United States Government "hav[ing] or permit[ting] others to use technical data. . .for commercial purposes."

The proposed rule includes a separate definition of "Government purpose" which is as follows:

Government purpose means any activity in which the United States Government is a party, including cooperative agreements

¹ It should be noted that the term "commercial purposes" is not defined in either the current version of DFARS 252.227-7013 or in the proposed version of that clause.

with international or multilateral defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

Proposed DFARS 252.227-7013(a)(11), 59 Fed.Reg. 31605. The first sentence of the proposed definition substantially expands the definition of "Government purpose" from its current definition. The phrase "any activity in which the United States Government is a party" is extraordinarily broad and provides no limitations on the use of technical data, regardless of the nature of the United States Government's participation in an "activity." To avoid an excessive encroachment into the commercial sector and unwarranted infringement of private rights — which was surely not intended by the Section 807 panel — the "activity" in question should be limited to government contract matters that are undertaken by the United States Government for its own use, not for use by third parties.

This, however, is not the theme of the proposed definition of "Government purpose," which expands its scope to include (1) cooperative agreements with international or multilateral defense organizations or (2) sales or transfers by the United States Government to foreign governments or international organizations. Neither situation is specified in the current definition of "Government purposes" and neither situation can reasonably be read as falling under the ambit of competitive procurement, which can only be reasonably understood as competitive procurements for the United States Government. It is patently clear, therefore, this new definition will include a number of situations that are not covered by the current definition of "Government purposes."

It is equally clear that when the U.S. Government seeks to provide technical data in connection with such sales or transfers, it is acting in a commercial capacity. By acting in such a manner, the U.S. Government is depriving the contractor which developed nearly all of the technical data through its own sources of funding the right to pursue the non-U.S. Government market for the product without Government interference. Instead, the U.S. Government is acting as a commercial competitor of the contractor, which should not be tolerated and which is contrary to historic Government policy and the apparent intent of this proposed rule.

The proposed definition of "Government purpose" suggests that it is permissible to use technical data for "any activity in which the United States Government is a party," but retains the existing definition's prohibition on the use of technical data by the U.S. Government, or "others," for commercial purposes. This distinction, especially in the context of "sales or transfers by the United States Government to foreign governments or international organizations," is meaningless and results in providing a substantial commercial benefit to the contractor which has been allowed the use of such data, although that contractor contributed nothing to its development.

Thus, the first sentence of the definition of "Government purpose" is overly expansive. It should be changed to read as follows:

Government purpose means any activity in which the United States Government is a party, excepting sales or transfers by the United States Government to foreign governments or international organizations under the Foreign Military Financing program.

The second sentence of the proposed definition of "Government purpose" properly retains the portion of the existing definition which refers to "competitive procurement." I support the expansion of the definition of prohibited activities to include "modify, reproduce, release, perform, display or disclose" in addition to "use" of technical data. However, I am concerned that the "have or permit" language in the current definition has been replaced with "authorize others to do so." The existing language indicates that the Government should not passively allow others to use GPLR technical data in a prohibited commercial manner. By changing the language to "authorize," the Government appears to be washing its hands of attempting to undertake even a modicum of effort to prevent the improper use of Government Purpose Rights data, regardless of how a contractor may have come to obtain that information. I would therefore recommend modifying the second sentence to read as follows, with the changes indicated in boldface type:

Government purposes include competitive procurement for the United States Government, but do not include the rights of the United States Government to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or for the United States Government to have, permit or authorize others to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes.

II. PROPOSED DEFINITION OF "GOVERNMENT PURPOSE RIGHTS"

The proposed definition of "Government Purpose Rights," proposed DFARS 252.227-7013(a)(12), consists of two subparagraphs. The definition of "Government Purpose Rights" should be changed to reflect the above-suggested changes to the proposed definition of "Government purpose" in proposed DFARS 252.227-7013(a)(11). I suggest changing the word "government" in subparagraph (i) to "United States Government" so that it is clear that Government purposes apply only to the United States Government, and not to any and all governments in the world. Accordingly, subparagraph (i) would read as follows (with the new language in boldface):

- (12) Government purpose rights means the rights to --
 - (i) Use, modify, reproduce, release, perform, display, or disclose technical within the United States Government without restriction.

Subparagraph (ii) of proposed DFARS 252.227-7013(a)(12) should be modified to further restrict the unauthorized dissemination reflect the changes discussed above so that it reads as follows (with changes in boldface type):

(12) Government purpose rights means the rights to --

(ii) Release or disclose technical data outside the United States Government and authorize persons to whom release or disclosure has been [made]² to use, modify, reproduce³, release, perform, display or disclose that data for United States government purposes as defined in this clause.

² A word is clearly missing from the version published in the June 20, 1994 Federal Register. <u>See</u> 59 Fed.Reg. 31605. The word "made" is appropriate.

³ The word "reproduced" is used in the proposed rule published in "Federal Register." All of the other verbs are in the present tense.

I believe that adoption of these changes will further clarify the rights of both the United States Government and private contractors in the area of Government purpose technical data rights. Thank you for your consideration.

Sincerely,

Melvin Rishe



August 19, 1994

Deputy Director Major Policy Initiatives 1211 S. Fern Street Room C-109 Arlington, VA 22202-2808

Software

Attention

Ms. Angelena Moy

OUSDA (A&T)/DDP

Publishers

RE:

DAR Case 91-312

Association

Dear Ms. Moy:

The Software Publishers Association (SPA) appreciates the opportunity to comment on the Department of Defense's proposed rule on Rights in Technical Data as published in the June 20, 1994 Federal Register (59 Fed. Reg. 31584). The SPA is the principal trade association of the personal computer software industry. Since 1984, it has grown to over 1100 members, representing the leading developers in the business, education, and consumer software markets.

As we have often noted in our comments on Multiple Award Schedule reform, the software industry is interested in reducing the cost of doing business with the government. Doing business with the government should be similar to doing business in the commercial marketplace, which would result in greater competition and lower prices for government customers. The proposed rule is generally consistent with this principle, and would clarify current regulations concerning rights in commercial computer software and documentation. However, some points require further clarification.

The regulations must be revised to provide that commercial software developed without government funding or assistance is subject to the same terms and conditions as would be encountered in a commercial transaction. Specifically, GSA should amend its MAS solicitation for software to state that DOD rules should apply to DOD purchases of commercial software and documentation. Therefore, the word "not" should be deleted from Section 227.500(b). This would make DOD purchases consistent with one set of regulations, streamline the procurement process, and more closely follow commercial licensing practice.



The definition of "commercial computer software" and its attendant documentation should be clarified to refer only to software developed without government funding. Such a change would reflect the reality that the vast preponderance of software products in the commercial marketplace are developed without government funding, and would reduce the cost and risk to vendors of doing business with the government.

In subsection 227.503, the terms "computer software and computer software documentation" should be replaced with "noncommercial computer software" and "noncommercial software documentation", respectively, throughout, for clarification. The subsection title indicates that it addresses only the latter, but use of the former terms could be misleading. For example, as currently written in subsection 227-503-10(b), by invoking clause 252.227-7014, the proposed rule states that software that does not have restrictive markings will be considered as delivered to the government with unlimited rights. The rule would also require manufacturers to establish written procedures and records to justify restrictive markings. It is vital that the rule be changed to minimize the potential pitfalls for manufacturers seeking to protect their intellectual property while licensing commercial software to DOD. Many SPA members are small firms that do not have the resources to establish and maintain rigorous procedures and records requirements, and would regard doing business with the government as too risky and burdensome. The government benefits in the long run and will attract a wider range of products and more competition if it simplifies and streamlines the procedures for vendors to guard their intellectual property.

DOD's efforts to refine procurement and technical data rights in the proposed rule are laudable. But the regulations must be refined further to reflect the commercial marketplace and reap its competitive benefits. Commercial software that has been developed without government funding must be sold to the government under commercial terms and conditions.

Thank you for the opportunity to comment on the proposed rule.

Software

Publishers

Association

Sincerely

Douglas R.

Government Affairs Manager



Recept 94

From P.O. Box 1288

Springfield, OH 45501

513 - 390-3000

Fax 513 - 390-0593

Fax 513 - 390-0597

July 28, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATT:Ms. Angelena Moy, OUSD (A&T)/DDP

Subj: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not, develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. SPECO has provided this service since 1950.

We at SPECO are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

Changes in language concerning data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.

Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through competition as well as a right to data <u>developed--according to any formula-with any of our tax dollars</u>.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs being sent offshore and a return to the \$500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

David R. Riley

President and COO



SRI INTERNATIONAL

Science & Technology Group **Contracts Department**

FACSIMILE TRANSMITTAL SHEET

Message To:

FAX NUMBER:

763-604-597/

COMPANY:

ATTENTION: Alyce Sullivan

DATE:

8/18/94

Message From:

NAME:

PAUL ROSATI

TELEPHONE:

415-859-5761

REFERENCE:

This is transmitted from fax number (415) 859-2829

NUMBER OF PAGES: PLUS THIS TRANSMITTAL SHEET

Please see attached.

you need more information, please ne at phone 415-859-5,761.

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SRI INTERNATIONAL

333 Ravenswood Ave. • Menlo Park, CA 94025 • (415) 326-6200 • TWX: 910-373-2046 • Telex: 334486 • Fax.: (415)326-5512

Comments to 6/20/94 Proposed Rule Change to DFARS Subpart 227.4

President Clinton and Vice President Gore in "Technology for America's Economic Growth, A New Direction to Build Economic Strength" (2/22/93) states on page 23 "...the federal government will begin steps necessary to achieve the following reforms...• Agencies should obtain rights in technologies developed under government contracts only to the extent necessary to meet the agencies' needs, leaving contractors with the rights necessary to encourage private sector investment in the development of commercial applications."

As a contract negotiator for the private sector it is oftentimes difficult and time consuming in getting the government negotiator to recognize my company's needs. My recommendation is to include prescriptive language that a buyer and seller can refer to that explains the need. For example, " During the performance of the proposed contract, the seller will be drawing upon and utilizing a part of its existing intellectual property base that has potential commercial value. Such intellectual property includes technical data and computer software arising out of or developed under previous contracts supported by varying degrees of government and private funds. In order to protect the seller's economic interests in future commercial development or utilization activities, the seller's contract deliverables of technical data and computer software under the resultant contract will be provided with license rights for government purposes only for a period of 5 years." After the government buyer can read and recognize the seller's needs, then there should be a simple menu-type selection system (using either -X clauses or Alternate clauses) that allows easy and clear selection of the exact license right that is given, e.g., GPLR.



UNC INCORPORATED

175 Admiral Cochrane Drive
Annapolis, Maryland 21401-7394
410/266-9101

Marc R. Jartman Vice President Government Affairs

August 18, 1994

Department of Defense
Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATTENTION: Ms. Angelena Moy

Reference: DAR Case 91-312

Dear Ms. Moy:

UNC Incorporated manufactures and remanufactures jet engines and aircraft gas turbine engines, refurbishes helicopters and provides aircraft maintenance and pilot training services. The company employs 7,000 and serves Department of Defense (DoD) and commercial customers worldwide.

The company provides aircraft engine parts to original equipment manufacturers (OEMs) for new equipment as well as replacement parts and repairs for aftermarket sales. UNC also provides spare parts and repairs directly to the military under the Spare Parts Breakout Program. In addition, UNC provides third party maintenance of military aircraft and other equipment for DoD. In each phase of our DoD business, we are dependent upon technical data being readily available from the government in order to provide competitively priced products and services.

The proposed regulations appear to be unjustifiably biased toward equipment developers to the detriment of the government and its suppliers of logistical support. One particularly offensive aspect of these regulations would permit a developer to limit the government to "government purpose rights" related to an item developed primarily at government expense with a small amount of private funding or, worse yet, developed completely at government expense with a small amount of government indirect development expense.

Because of the ease by which a developer could cause "mixed" funding to be used for development or "private" funding to be used for a slight modification of equipment, we believe that the new regulation will open the door to abuses by developers who are pressured to retain follow-on sole-source logistics support business for the systems they have developed. Sole-source contracting is much more

Department of Defense August 18, 1994 Page 2

costly to the government than competitive contracting, particularly when it involves developers and OEMs who, for good reasons, have overhead cost structures significantly greater than the contractors that provide logistical support to DoD.

Contracting officers may be getting an erroneous message from the new regulations regarding the importance of data rights for the government. Under the current regulations a contracting officer starts from a negotiating position where the government has unlimited data rights. Under the new regulations the contracting officer most likely will be dealing with a "mixed" funding situation where "government purpose rights" is the starting point. Further, the new regulations will place contracting officers in a conflict of interest position. They will face the dilemma of aggressively pursuing maximum data rights for the government aiming at future competitive support or favoring the current development program by economizing on the pursuit of data rights. In the latter case, DoD and the U.S. taxpayer would pay significantly more in the long run for use of data which should rightfully belong to the government. This type of policy level decision would appear to be more appropriately made by senior service or DoD acquisition executives.

We strongly recommend that the current regulations regarding data rights remain in effect. They more fairly protect the taxpayers' investment in the development of military equipment and provide DoD greater flexibility in obtaining competitive, lower cost logistical support for military equipment during its operational life cycle.

Should DoD choose to continue its efforts to change the regulations we urge that the attached modifications to the proposed regulations be incorporated. These would provide guidance and direction regarding the importance of technical data rights in achieving the economies of competitive logistical support in the future.

We hope you will find our comments informative and constructive. If you have any questions or desire any additional input please do not hesitate to call.

Sincerely,

March.

MJ/lkt Attachment

Attachment to UNC Incorporated Letter Dated August 18, 1994

COMMENTS ON PROPOSED DFAR SUPPLEMENT RIGHTS IN TECHNICAL DATA

- 1. 227.403-1(f) [add] In accordance with Subpart 217.75, acquisition of replenishment parts, whether or not under the DoD Spare Parts Breakout Program (see Appendix E), shall be fully evaluated with regard to rights in technical data which are to be acquired by the Government for such replenishment parts. For acquisition contracts exceeding \$5,000,000, contracting officers shall make every effort to obtain, as a minimum, government purpose rights (as defined in 252.227-7013(a) (11) from prospective contractors. Where the government is due "unlimited" rights or "government purpose" rights and these rights are not obtained, the contracting officer will notify the head of the procuring activity who will evaluate recommendations and make the final decision whether to further pursue the acquisition of the appropriate level of data rights. If the appropriate level of data rights is not obtained, the results of this effort shall be memorialized in the contract file and forwarded to the Under Secretary of Defense, Acquisition and Technology.
- 2. 227.403-4(a)(1) When an item, component, or process is developed with mixed funding, the Government may use, release, or disclose the data pertaining to such items, components or processes within the Government without restriction but may release or disclose the data outside the Government only for Government purposes (government purpose rights) such as Acquisition of Replenishment Parts under Subpart 217.75 and repair and maintenance by third parties.
- 3. 252.227-7013(a)(11): Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, acquisition of replenishment parts and repair and maintenance by third parties, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.
- 4. 227.403-13(a) [add at end of paragraph] For acquisitions involving provisioning (as that term is used in Appendix E) and for acquisition of replenishment parts under Subpart 217.75, contracting officers shall carefully examine during the challenge period the need to initiate challenge and validation procedures regarding a contractor's assertions of restrictions.

Attachment to UNC Incorporated Letter dated August 18, 1994

- *5. 227.503-1(e) [add] In accordance with Subpart 217.75, acquisition of replenishment parts, whether or not under the DoD Spare Parts Breakout Program (see Appendix E), shall be fully evaluated with regard to rights in noncommercial computer software and noncommercial computer software documentation which are to be acquired by the Government for such replenishment parts. For acquisition contracts exceeding \$5,000,000, contracting officers shall make every effort to obtain, as a minimum, government purpose rights (as defined in 252.227-7014(a)(10) from prospective contractors. Where the government is due "unlimited" rights or "government purpose" rights and these rights are not obtained, the contracting officer will notify the head of the procuring activity who will evaluate recommendations and make the final decision whether to further pursue the acquisition of the appropriate level of data rights. If the appropriate level of data rights is not obtained, the results of this effort shall be memorialized in the contract file and forwarded to the Under Secretary of Defense, Acquisition and Technology.
- *6. 227.503-2(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition, to desired software performance compatibility, or other technical considerations, needs determinations should consider such factors as multiple site, shared use requirements, acquisition of replenishment parts, or maintenance and repair by third parties, whether the Government's software maintenance philosophy will require the right to modify the software, and any special computer software documentation requirements.
- *7. 227.503-13(a) [add] For acquisitions involving provisioning (as that term is used in Appendix E) and for acquisition of replenishment parts under Subpart 217.75, contracting officers shall carefully examine during the challenge period (see procedures in 252.227-7019) the need to initiate challenge and validation procedures regarding a contractor's assertions of restrictions.
- *8. 252.227-7014(a)(10) Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, acquisition of replenishment parts and maintenance and repair by third parties, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

Attachment to UNC Incorporated Letter Dated August 18, 1994

9. 252.227-7018(a)(13) Government purpose means any activity in which the United states Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, acquisition of replenishment parts and maintenance repair by third parties, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

Notes:

The underlined sections are additions to proposed rules.

The above paragraphs marked with an asterisk (*) related to rights in non commercial computer software and documentation are included since technical data may be recorded, stored and transmitted in the form of computer software.